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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 775

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, ET AL., APPELLANTS,

vs.

TAX COMMMISSION OF THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED MARCH 3, 1937.

SUPREME COURT OF THE UNITED STATES

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No. 773

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vs.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

No. 15850

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, Copartners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company, Plaintiffs,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, Thomas S. Hedges and T. M. Jenner, Constituting the Tax Commission of the State of Washington, Defendants

AMENDED COMPLAINT—Filed August 26, 1935

For an amended cause of action plaintiffs allege:

1. Plaintiff Silas Mason Company, Inc., is a corporation organized and existing under the laws of the state of Delaware, and is a citizen and resident of such state. Plaintiff Walsh Construction Company is a corporation organized and existing under the laws of the state of Iowa, and is a citizen and resident of such state. Plaintiff Atkinson-Kier Company is a copartnership consisting of Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, all of whom are citizens and residents of the state of California. Plaintiff Mason-Walsh-Atkinson-Kier Company is a corporation organized and existing under the laws of the state of Delaware, and is a citizen and resident of that State. None of the plaintiffs other than the Mason-Walsh-Atkinson-Kier Company is engaged in any business, calling, occupation, vocation or work within the State of Washington. The Mason-Walsh-Atkinson-Kier Company, whose nature and activities will later be described, and whose occupations [fol. 3] are conducted wholly on land within the state over which it has ceded jurisdiction to the United States, has nevertheless elected to treat its operations as being partially within the state, and has paid to the State its annual license fee last due.

2. The defendants Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, constitute the Tax Commission of the State of Washington.

3. For a number of years the people of the Pacific Northwest have been, and they are now, much interested in the development of the Columbia River and its principal tributaries. Of the rivers in the United States the Columbia River is second in size only to the Mississippi River. Its source is in lakes in British Columbia, which in turn are fed from mountain streams and lakes of the Rocky Mountains in both Canada and the United States. Above its lower reaches, the river partakes of the character of a mountain stream, its fall being great, its current swift, and its course marked at intervals of a few miles by rapids flowing over and through rocky masses of such magnitude as to render by the construction of canals and locks. The alternations in its flow are great, its period of high water depending for time and intensity upon the melting of snow in the mountains where are its sources. Its principal tributary is the Snake River whose waters are drawn from the Bitter Root and Rocky Mountains in Idaho and Montana. The Snake River has the same characteristics as the Columbia River. With improvements that have been made and are contemplated, the Columbia is commercially navigable from its mouth to the mouth of the Snake, and the Snake from its junctions with the Columbia to the confluence of the Snake [fol. 4] and Clearwater. Above the mouth of the Snake, the Columbia is navigable locally, from pool to pool as far as the mouth of the Okanogan River, and that stream in turn is navigable for some distance. All such nagivation is difficult and is not commercially feasible because of the alternations in the flow of the stream, its great fall and consequent swiftness of current, and the rapids and obstructing masses of rock which so frequently dot its course. The same characteristics which impair or destroy the navigability of the Columbia, render it an ideal stream for the development of hydroelectric power, and it is the greatest power stream in the United States, perhaps in the world. For the greater part of its length within the United States, the Columbia flows through an arid country, the land being immensely productive and rich when placed under irrigation, but of no value without irrigation.

4. The course of the Columbia in the United States for the greater part of its length lies wholly within the state of Washington. From shortly below the mouth of the Snake, the Columbia is the boundary between the states of Washington and Oregon. There has been sporadic improvement of the Columbia extending over a good many years. The work has been done principally by the United States, for the improvement of navigation. The pressure of the people of the northwest for more comprehensive improvement of the stream and its tributaries caused an extended and detailed survey of the subject by the Corps of Engineers of the War Department, and in 1932 the Chief of Engineers of the United States Army recommended a comprehensive plan for the improvement and development of the Columbia River within the United States. This recommendation took into consideration the improvement of the river and the use of its waters for the purposes of navigation, flood control, power development, and irrigation. It recommended the construction of ten dams across the river at various points within the state of Washington and where the river is the [fol. 5] boundary between Washington and Oregon. The uppermost of these dams was one at the head of Grand Coulee, Washington, a point wholly within the State of Washington, about 150 miles below the international boundary line and 274 miles above the mouth of the Snake River. This dam was the most important step in the plan of improvement proposed. As recommended, it represented an estimated cost of $204,000,000 of an estimated total cost of $711,000,000 for the ten dams. It would create a lake 150 miles long extending to the international boundary, afford irrigation facilities for 1,200,000 acres of irrigable land, admit of the production of electrical power at a lower cost than it could be produced at any other point in the United States, control the flow of flood waters and give storage facilities for the smaller dams below it, and benefit the lower reaches of the river for purposes of navigation and flood control. The plan of improvement recommended was commonly referred to thereafter, both in the northwest and in Congress, as the Columbia Basin project, and the dam at the head of the Grand Coulee was similarly known as the Grand Coulee or Coulee dam.

5. By Chapter 81, Laws 1933, the Legislature of Washington created the Columbia Basin Commission for the purpose

of furthering the Columbia Basin project. The Commission so created was required to make reports of its activities, expenditures and the developments to all regular and special sessions of the Legislature. It has made two reports; the first bearing date of December 19, 1933, and the second bearing date of January 22, 1935, covering the period from December 19, 1933, to January 1, 1935. Plaintiffs refer to those reports for a history of the connection of the state of Washington with the Columbia Basin project and of what has been done respecting the project by the State and the United States, either in conjunction with each other or inde- [fol. 6] pendently one of the other, and ask that those reports be considered for all purposes germane to this bill as though set forth at large herein. Plaintiffs also crave reference to the printed copy of the hearings before the Committee on Irrigation and Reclamation, House of Representatives, Seventy-second Congress First Session On The Bill H. R. 7446 and ask that it also be read as a part of this bill, so far as germane thereto.

6. Upon, to wit, June 16, 1933, the President made the following executive order:

"Administration of Public Work

"Pursuant to the authority of 'An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes', approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof:

"1. I hereby appoint Colonel Donald H. Sawyer to exercise temporarily the office of Federal Emergency Administrator of Public Works.

"2. I hereby appoint a Special Board for Public Works consisting of the following: The Secretary of the Interior, Chairman; The Secretary of War; the Attorney General; the Secretary of Agriculture; the Secretary of Commerce; the Secretary of Labor; the Director of the Budget; Colonel George R. Spaulding, and Assistant Secretary of the Treasury Robert.

"During the ensuing 30 days the Federal Emergency Administrator of Public Works shall have authority to allot the

sum of not to exceed $400,000,000 provided for in title II of said act for highway building for distribution among the states, Territories, and the District of Columbia, and authority to allot the sum of not to exceed $238,000,000 to the Department of the Navy for the construction of certain vessels, the construction whereof conforms to the London Naval Treaty and has heretofore been approved by me.

"The Distribution of the money herein allocated for public words shall be subject to the approval of the Board for Public Works.

"The Federal Emergency Administrator of Public Works is hereby authorized to employ such necessary personnel on a temporary basis as may be approved by the Board.

[fol. 7] "During the next 20 days it shall be the duty of the Federal Emergency Administrator of Public Works and the Board herein constituted to study and report to me on all public-works projects which have heretofore been submitted or shall hereafter be submitted.

"Franklin D. Roosevelt."

"The White House, June 16, 1933."

This was followed on June 8, 1933, by the appointment of Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works. Thereafter, the President, under authority of Title II of the National Industrial Recovery Act, passed at the first session of the Seventy-third Congress 1933, and particularly of Sections, 201, 202 and 203 of said Act, directed the Administrator of Public Works to include in the program of public works enumerated in and contemplated by Section 202 the Grand Coulee dam and power plant in the State of Washington as a part of the Columbia Basis project in such state. There followed from time to time orders of the Special Board relating to the Grand Coulee dam which appear as Exhibits 1, 2, 3, 4, and 5 to the bill, and to be read as a part hereof so far as germane. A contract relating to preliminary work on the Grand Coulee dam was entered into between the United States, acting through the Department of the Interior, Bureau of Reclamation and the State of Washington, acting through the Columbia Basin Commission. A copy of that contract is attached as exhibit 6 hereto, and is prayed to be read as a part hereof in showing the progress of the project. Later another contract was made between the same parties, acting through the

same agencies, a copy of which is attached hereto, marked exhibit 7, and is to be read as a part of the bill for the purpose of showing the history and progress of the project. Still later the Department of the Interior, Bureau of Reclamation, [fol. 8] prepared Specifications No. 570 for the construction of a part of the work aforesaid as a part of the Columbia Basin project, and called for bids for doing the work thereon. Among others, plaintiffs (other than the Mason-Walsh-Atkinson-Kier Company) bid on the work and their bid was accepted. Upon, to wit, July 16, 1934, a contract was entered into by the United States of America, parties of the one part, and the plaintiffs (other than the Mason-Walsh-Atkinson-Kier Company), parties of the other part, whereby the second parties agreed to furnish labor and materials and to perform all work required for the construction of that part of the Grand Coulee dam and power plant, as covered by Items 1 to 85, inclusive of the schedule of Specification 570, Columbia Basin Project, and were to receive as consideration for the performance of the work and for such labor and materials as were agreed to be supplied by them the total sum of $29,339,301.50.

7. Each of the plaintiff organizations (other than the Mason-Walsh-Atkinson-Kier (Company) is a business organization doing business (principally in contracting and allied lines) on a large scale in widely separated parts of the United States. No one has any business connection or interrelation with any other, save that the three organizations made a joint bid for the advertised work on the Grand Coulee dam. It was necessary that that work be done in a unitary manner, and that its transactions, obligations and profits should be kept entirely separate from the other business enterprises then carried on or thereafter to be carried on by each of the organizations operating separately. For administrative purposes in the performance of the contract and the accounting for losses or profits arising therefrom, and that there might be no confusion of the jointly undertaken work with the severally conducted business operations of the three contracting organizations elsewhere they caused the plaintiff Mason-Walsh-Atkinson-Kier Company to be organized as a corporation under the laws of the State of Delaware, directly or through their agents taking all the [fol. 9] capital stock of that corporation and furnishing all its officers. Deeming that an assignment or other transfer

of the contract was forbidden by #15, Title 41, U. S. C. A. (R. S. #3737), the plaintiffs making the contract with the United States aforesaid entered into an agreement with plaintiff Mason-Walsh-Atkinson-Kier Company, a copy of which is attached hereto, marked Exhibit 8, and is prayed to be read as a part hereof. From the beginning and at every step in its progress, the work on the Grand Coulee dam agreed to be done by the contracting plaintiffs under their contract with the United States, has been done by their agent and alter ego, the Mason-Walsh-Atkinson-Kier Company. Through the officers and agents whom they have placed in charge of it, the contract with the United States is being performed. They alone are responsible for the performance of the contract, they have given bond in the sum of $5,000,000 for its performance, and they alone will profit or lose through its performance. The corporation Mason-Walsh-Atkinson-Kier Company is an entity brought into being by them for the more convenient and economical doing of the work under the contract. In speaking hereafter of things done by plaintiffs in the performance of the contract or dealings in connection therewith, it is to be understood that the particular action was taken directly and in fact by the Mason-Walsh-Atkinson-Kier Company, but as the agent of the other plaintiffs; hence the allegation will be that it was done by the plaintiffs without distinguishing between them.

8. Under the aforesaid contract the United States undertook and agreed to furnish a large part of the materials required for the construction of the dam and power plant, and the plaintiffs have agreed to furnish the remainder of such materials and to do all the work necessary for its construction. Among other stipulations of the contract, it was provided:

[fol. 10] (1) That the officer entering into the contract on behalf of the United States and in charge of the work required to be done thereunder, called the contracting officer, might, at any time, by a written order, make changes in the drawings and specifications of the contract and within the general scope thereof, and that if such changes should cause an increase or decrease in the amount agreed to be paid for the work and materials furnished by plaintiffs an equitable adjustment should be made.

(2) That should either of the parties discover, during the progress of the work, sub-surface or latent conditions

at the site of the work materially differing from those shown on the drawings accompanying the contract or indicated in the specifications, the attention of the contracting officer should be immediately called to such conditions, and if he found that they materially differed from those shown on the drawings or indicated in the specifications he should make such changes in the drawings and specifications as he might find necessary, and any increase or decrease of cost or difference in time resulting from such changed conditions should be equitably adjusted.

(3) That plaintiffs should furnish to the contracting officer for his approval, the name of the manufacturer of machinery, mechanical and other equipment which they contemplate installing, together with their performance capacities and other pertinent information, and the contracting officer should, if he approved thereof, so indicate, and that any machinery, equipment, materials and articles installed or used without such approval, should be at the risk of subsequent rejection.

(4) That only such unmanufactured articles, materials and supplies as have been mined or produced in the United States, and only such manufactured articles, materials and supplies as have been manufactured in the United States should be used in the performance of the work unless otherwise provided in the specifications.

[fol. 11] (5) That only articles, materials and supplies produced under codes of fair competition, approved under Title I of the National Industrial Recovery Act or under the President's Re-employment Commission, should be used in the performance of the work except when the contracting officer certified that the requirement was not in the public interest.

(6) That, so far as practicable, and subject to the provisions of the two preceding paragraphs, preference should be given to the use of locally produced materials unless such use involved higher cost, inferior quality or insufficient quantities as might be determined by the contracting officer.

(7) (a) No Mongolian labor should be employed in the performance of the work required of plaintiffs.

(b) No convict labor should be employed on the project, and no materials manufactured or produced by convict labor should be used thereon.

(c) The contracting officer might require plaintiffs to dismiss from the work such employes as the contracting officer might deem incompetent, careless, insubordinate, or otherwise objectionable.

(d) Except in executive, administrative and supervisory positions, so far as practicable and feasible in the judgment of the contracting officer, no individual directly employed on the project should be permitted to work more than 40 hours in any one week and more than 8 hours in any one day.

(e) All employes directly employed on the work should be paid just and reasonable wages which should be compensation sufficient to provide for the hours of labor as limited and a standard of living in decency and comfort; the minimum hourly wage rate for skilled labor should be $1.20 and [fol. 12] for unskilled labor 50 cents, and rate for semi-skilled labor should be fixed so as to fall between the minima fixed for skilled and unskilled labor and bear normally the relation to these existing in the locality of the work.

(f) The maximum of human labor should be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage.

(g) The plaintiffs should extend to every person performing the work of a laborer or mechanic on the project the benefits of the labor and wage provisions of the contract regardless of any contractual relationship between the plaintiffs and such labor- or mechanic.

(h) The Federal Emergency Administrator of public works and the contracting officer should have access to all payrolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of the contract.

(i) Plaintiffs were required to report in triplicate, monthly, through the contracting officer, within five days after the close of each calendar month, on forms to be furnished by the United States, Department of Labor, the number of persons on their respective payrolls, the aggregate amount of such payrolls, and the amount of hours worked, wage scales paid to various classes of labor, and the total expenditures for materials.

(j) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work

should be posted in a prominent and easily accessible place at the site of the work, and the plaintiffs should keep a true and correct record of the hours worked by, and the wages paid to each employe, and furnish the contracting officer with a sworn statement thereof on demand.

[fol. 13] (k) All employees should be paid in full not less often than once each week and in lawful money of the United States in the full amount accruing to each individual at the time of the closing of the payroll, and there should be no deduction or rebates on account of goods purchased, rent, or other obligation.

(l) The minimum wage rates established should be subject to change by the Federal Emergency Administrator of Public Works on recommendation of the Board of Labor Review.

(m) The Board of Labor Review should hear all labor issues arising under the contract, and such as might result from fundamental changes in economic conditions during the life of the contract, and the decision of the Board of Labor Review should be binding upon all parties.

(n) Preference should be given, when qualified, to ex-service men, in certain manner and order specified.

(o) To the fullest extend possible labor required for the project should be chosen from the list of qualified workers submitted by local employment agencies designated by the United States Employment Service, but organized labor skilled and unskilled, should not be required to register at the local employment agencies but should be secured in customary way through recognized union locals.

(p) Plaintiffs agreed to comply with the conditions prescribed in Sections 7a-1 and 7a-2 of Title 1 of the National Industrial Recovery Act.

(q) Pursuant to the foregoing provisions, and other provisions therein contained, the Department of the Interior, Bureau of Reclamation, has caused the United States Employment Service to establish one of its local offices on the federal area described in paragraph 6 of this complaint, by means of which such United States Employment Service, on behalf of the United States of America, directs the em-[fol. 14] ployment of and furnishes to these plaintiffs, all

the workers used by the plaintiffs in the performance of said contract, save only the administrative personnel of the plaintiffs.

(8) That the contracting officer might order the plaintiffs to suspend any work that might be subject to damage by climatic conditions.

(9) The contracting officer was authorized to establish sanitary and police rules and regulations for all forces employed upon the work.

(10) That the construction program should be at all times subject to the approval of the contracting officer, and the capacity of the construction plant, sequence of operations and methods of operation should — such as to ensure the completion of the work within the period of time specified in the contract, and that revised construction programs should be submitted by the plaintiffs at intervals of not more than six months, and the contracting officer be advised immediately of any proposed changes in the program.

(11) That when additional information regarding foundation or other conditions become- available as a result of the excavation work, further testing, or otherwise, if it should be found desirable to change the location, alignment, dimentions or designs of the dam or power plant to meet such conditions, the United States should have the right to make such reasonable changes as in the opinion of the contracting officer should be considered necessary or desirable and plaintiff should be entitled to no extra compensation because of such changes except that any increase in the amount of excavation, concrete or other required work for which items are provided in the schedule, should be paid for at the unit price bid therefor in the schedule.

[fol. 15] (12) That if, at any time within the contract period, the construction of the Grand Coulee dam to the full height contemplated for the ultimate development of the project should be authorized, the United States should have the right to terminate the contract upon 30 days notice in writing, whereupon all materials on hand, improvements, etc., should be turned over to the United States and payment should be made therefor at cost plus 10%.

(13) That sand and gravel required in the construction work should be obtained from designated gravel deposits

which were to be acquired by the United States and turned over to plaintiffs for purposes of the work, subject to a number of stated conditions.

(14) That the United States has designated a tract of land on the east side of the Columbia River as a site for use for office headquarters, buildings, warehouses, garages, commissary, hospital, dormitories, boarding houses, homes for the contractors' employes, and other incidental purposes, and the plaintiffs were required to construct, maintain and operate under competent direction, on the site designated, all such facilities above described as might be required for carrying out the contract; the construction operation and maintenance of such facilities to be subject to the approval of the contracting officer.

(15) Plaintiffs were required to perform such grading, surfacing and maintenance of streets in the camp site as in the opinion of the contracting officer should be required to provide for safe and satisfactory use by the public, and to construct suitable sidewalks to serve all parts of the camp site, and to light the streets in a designated manner. With the exception of churches and other eleemosynary institutions, all buildings and improvements in the camp site were required to be constructed and owned by the [fol. 16] plaintiffs.

(16) That the type of construction and plans and specifications for the buildings erected in the camp site should be subject to the approval of the contracting officer.

(17) That the plaintiffs should construct and furnish adequate water system for supplying the camp site with water for domestic purposes, fire protection and irrigation purposes, all subject to the approval of the contracting officer.

(18) That the plaintiffs should furnish and install a complete sewer system that should serve every house within the camp site, all details subject to the approval of the contracting officer.

(19) That in addition to the facilities to be operated by the plaintiffs, they were permitted to lease space in buildings erected and owned by them for conducting such business and services as in the opinion of the contracting officer might be required for the convenience of the residents of the camp site, but all leases should be subject to the

approval of the contracting officer and should contain provisions making them subject to termination by the contracting officer.

(20) The quality of quarters provided for the use of the employes are regulated and the prices which might be charged therefor. Similar provision was made for the regulation of meals furnished and the rates chargeable therefor.

(21) That plaintiffs should make the necessary arrangement with the proper state and county authorities for school facilities and instruction for the families of the employes and other residents in the camp site, for which no charge should be made. All these arrangements are subject to approval by the contracting officer.

(22) The contracting officer was given authority to determine all questions arising in the performance of the contract for which no other specific provision was made.

[fol. 17] 9. In due course plaintiffs entered upon the performance of the contract aforesaid, and they ever since have been and now are engaged in the work required of them by such contract. All such work is and must be done upon lands required by the United States of America, by purchase or condemnation, within the state of Washington, and all such lands were acquired for the purposes of the public works known as the Columbia Basin project, and described in the executive and administrative orders and bulletins providing for and referring to the construction of the Grand Coulee dam and power plant as a part of such project. The business of performing and rendering services for which the tax in controversy in this suit is sought to be laid was and will be wholly upon such lands, and the income received and to be received by plaintiffs, which will be used by the Tax Commission as the basis for measuring the amount of the tax which it intends to require plaintiffs to pay, is and will be the income derived from the business of rendering and performing services for the United States upon the aforesaid lands, and in the performance of their contract with the United States as aforesaid. Plaintiffs are not, and none of them is, engaged in any other business, calling, occupation, vocation or work within the State of Washington than the work prosecuted by them on lands

of the United States and under contract with the United States aforesaid.

10. The Tax Commission asserts that plaintiffs are subject to the payment of an occupation tax under the provisions of Chapter 191, Laws of Washington, 1933, as amended by Chapter 57, Laws of Washington, Extraordinary Session 1933, on account of the services rendered and performed by them under their contract with the United States upon the lands aforesaid, and that such tax is to be measured by the amount paid to them by the United States for service rendered to the United States as aforesaid. Plaintiffs deny, and each of them denies, that they [fol. 18] are subject to the payment of the demanded tax, and refuse to make a return for the basis of computation of the tax upon the compensation paid to them by the United States. The Tax Commission, by its duly authorized agents, has now made demand upon plaintiffs, and upon each of them, for the production of all books, papers, records and other data bearing upon and relating to plaintiffs' contract with the United States for the work done and to be done on the Grand Coulee dam and power site of the Columbia Basin project, upon the work done by plaintiffs under such contract, and upon the compensation received therefor. The Commission threatens to and will issue subpœnas and summons requiring plaintiffs and their officers to appear before the Commission and testify concerning the matters and things aforesaid, and to produce plaintiffs' books, papers, records, and all other data bearing upon said matters. Should plaintiffs and their officers fail to appear and testify, or should plaintiffs persist in their refusal to produce their books, papers, records and other data bearing upon their contract with the United States and what has been and is being done thereunder, the Commission will enforce or endeavor to enforce against plaintiffs and their officers, through proceedings in the courts, the pains and penalties prescribed by said Chapter 191 for failure to make returns, to produce books, papers, records and other data demanded by the Commission and to appear and testify as witnesses upon summons of the Commission.

11. In addition to all other legal objections to the usurpations of power by the Tax Commission which are disclosed by the complaint, the Commission's threatened proceed-

ings and the tax which it is about to lay are in violation of plaintiffs' rights under the Constitution of the United States in the following particulars:

(1) Plaintiffs are agencies and instrumentalities of the United States of America in carrying out the program of public works for National Industrial Recovery authorized [fol. 19] and put in force and executed by the Congress and the President, especially in the prosecution of the building of the Grand Coulee dam and power plant of the Columbia Basin project. The tax which defendants are threatening and attempting to levy and collect from plaintiffs is a tax upon the contract between the United States and plaintiffs, and is a tax upon the means employed by the United States in doing the work required by the contract with plaintiffs. Such a tax is forbidden by the fundamental principles of the constitutional system of the United States.

(2) Plaintiffs are citizens and residents of states other than Washington. They are within the state of Washington solely for the purpose of carrying out their contract obligations with the United States. Their only occupation within the state of Washington is the performance of the contract with the United States, and therefore, the income which they receive is income derived from the discharge of an employment by the United States, and this income is beyond the power of the state to tax.

(3) By Chapter 18, Laws of Washington, 1891 (Rem. Rev. Stat., Sec. 8108). The State of Washington consented to the acquisition by purchase or by condemnation by the United States of America, of tracts, pieces, and parcels of land within the boundaries of the state for the sites of locks, dams, piers, breakwaters, keepers dwellings and other necessary structures and properties required in the improvements of the rivers of the State or bordering thereon, and ceded to the United States of America the jurisdiction of the State over all such land or lands as might be acquired by purchase or by condemnation or set apart by the general government for any of the purposes mentioned, [fol. 20] such consent being given in accordance with the 17th clause of the 8th section of the first Article of the Constitution of the United States and with the Acts of Congress in such cases made and provided. The United States acted under such consent and cession in acquiring lands

upon which are situated the Grand Coulee dam and power plant whereon the work required of plaintiffs under their aforesaid contract with the United States is in progress. Such action and acquisition constituted a contract between the State of Washington and the United States by which the United States became possessed of exclusive jurisdiction for taxation purposes over the lands so acquired, and plaintiffs, by reason of their contractual relation to the United States and the necessity for discharging their contractual obligations upon the lands so acquired by the United States, are entitled to the benefit of the contract. The imposition by the State of an occupation tax upon plaintiffs on account of the work they are doing upon the acquired lands would be to impair the obligation of the contract between the State of Washington and the United States in violation of Section 10 of Article 1 of the Constitution of the United States.

(4) Plaintiffs' business is being conducted, and all of its books, papers, records and data of whatsoever character relating to its contract with the United States and its doings thereunder are situated, upon lands acquired by the United States, with the consent of the State of Washington as aforesaid, for the construction of the Grand Coulee dam and power plant. To compel the production of their books, papers, records and data respecting their transactions with the United States, and to impose a tax upon them because of the discharge of their contractual obligations to the United States upon the lands so acquired, would be to deprive plaintiffs of their liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 21] Plaintiffs specially set up and claim the protection of the Constitution of the United States and of its several provisions referred to, both those inherent and instinct in the Constitution and those expressly stated, from the proposed unwarrantable encroachments and trespasses of the Tax Commission.

12. Plaintiffs allege that the acts and threatened acts of the Tax Commission are, for the reasons heretofore stated, an attempt to deprive plaintiffs of their liberty and property without due process of law, in violation of Section 3 of Article 1, of the Constitution of the State of Washington, and the effect which the Commission seeks to give to Chap-

ters 191 and 57 aforesaid is to make them laws impairing the obligation of contracts in violation of Section 23 of Article 1 of the Constitution of the State of Washington. Plaintiffs claim the protection of those sections from the unwarranted acts and threatened acts of the Tax Commission.

Wherefore, plaintiffs pray that it may be adjudged and decreed that plaintiffs are not subject to the payment of an occupation tax under the provisions of Chapters 191 and 57, Laws of Washington 1933, referred to in the complaint, on account of the compensation paid them under their contract with the United States for the construction of the Grand Coulee dam and power plant of the Columbia Basin project, or otherwise; that defendants, and each of them, be restrained and enjoined from taking any steps to compel plaintiffs to produce their books, papers, records or any other data regarding their contract with the United States for the construction of the dam and power plant, or from summoning plaintiffs or their officers to appear and testify concerning such matters, or from compelling plaintiffs to make returns showing their income for purposes of taxation under the chapters aforesaid, and from taking any other step or doing any other thing looking to the laying of an occupation tax upon plaintiffs under [fol. 22] said chapters. And plaintiffs pray such other and further relief as may be meet and equitable in the premises.

Graves, Kizer & Graves, Attorneys for Plaintiffs.

Duly sworn to by W. G. Graves. Jurat omitted in printing.

[fol. 23] EXHIBIT "I" TO AMENDED COMPLAINT

Resolution by Special Board for Public Works

Whereas the President, under authority of Section 202 of the National Industrial Recovery Act, has directed the Administrator to include in the comprehensive program of public works contemplated by said section the Grand Coulee Dam Project on the Columbia River in the State of Washington.

Resolved that the Special Board include said project in the program and that the sum of $63,000,000 be allotted to said project to be expended by the Bureau of Reclamation, Department of the Interior, in accordance with the terms of a contract satisfactory to the Administrator between the United States and the State of Washington, or its duly authorized agency.

Adopted July 27, 1933.

[fol. 24] EXHIBIT "2" TO AMENDED COMPLAINT

Resolution by Special Board for Public Works

Subject: Allotment and transfer to Bureau of Reclamation, Department of the Interior, of $1,000,000 toward the construction of the Grand Coulee Dam project.

Whereas the Administrator and this Board of July 17 included in the comprehensive program the Grand Coulee Dam Project in the State of Washington and allotted $63,000,000 to the Bureau of Reclamation for its accomplishment, subject to a contract satisfactory to the Administrator between the United States and the State of Washington and/or its duly authorized agency, and it is now desired to hasten the accomplishment of said project and to provide the sum of $1,000,000 to finance the construction of working quarters and facilities for engineers and other employees of the Bureau of Reclamation engaged in preliminary investigation and preparation of plans and specifications for the dam and for the erection of a bridge across the Columbia river at the site of the dam, to enable work to be carried on, on both sides of the river:

Resolved that the sum of $1,000,000 of said allotment of $63,000,000 be transferred to said Bureau to finance said project in the respects stated, and that such expenditures thereof as may be made by the said Bureau shall be reimbursed to the United States by said State and the contract between the United States and the State of Washington or its duly authorized agency shall so provide.

Adopted September 12, 1933.

[fol. 25] EXHIBIT "3" TO AMENDED COMPLAINT

Resolution for Special Board

Subject: Reduction of allotment and transfer to Reclamation Bureau for the construction of the Grand Coulee project.

Whereas there has hitherto been allotted and transferred to the Reclamation Bureau, Department of the Interior, $63,000,000 for the construction of the Grand Coulee Dam project, and

Whereas it now appears that not to exceed $15,000,000 will be expended prior to January 1, 1935:

Resolved that the Administrator and this Board reconsider the transfer of $63,000,000 for the said project and transfer only the sum of $15,000,000.

October 16, 1933.

HTH.

[fol. 26] EXHIBIT "4" TO AMENDED COMPLAINT

Resolution for Special Board

Subject: Financing Grand Coulee Project.

Whereas this Board has heretofore allotted and transferred to the Reclamation Bureau, Department of the Interior, the sum of $15,000,000 to aid in financing the Grand Coulee Dam project and the said allotment and transfer was subject to the execution of a contract with the State of Washington satisfactory to the Administrator, and by resolution of this board adopted September 12 the sum of $1,000,000 was transferred to the Bureau of Reclamation to finance the construction of working quarters and facilities for engineers and other employes of the Bureau engaged in preliminary investigation and preparation of plans and specifications and said transfer was made prior to the execution of the contract satisfactory to the Administrator but was to be treated as an advance to the State of Washington, and the Commissioner of the Bureau of Reclamation now requests the transfer of an additional $1,000,000 to provide for the excavation and disposal of materials overlying the foundations of the Grand Coulee Dam prior to the execution of the said contract and as an advance to the

State of Washington to be later reimbursed to the United States:

Resolved that an additional sum of $1,000,000 of said allotment of $15,000,000 be transferred to said Bureau to finance said project in the respects stated and that such expenditure thereof as may be made by said Bureau shall be reimbursed to the United States by said state, and that the contract between the United States and the said state or its duly authorized agency shall so provide.

October 24, 1933.

[fol. 27] EXHIBIT "5" TO AMENDED COMPLAINT

Resolution for Special Board

Subject: Reconsideration of resolutions dealing with the Grand Coulee project as a project of the State of Washington and the adoption of a resolution making said project a Federal project and financing certain preliminary work thereon.

Whereas the Administrator and this Board by resolution of July 27, 1933, included in the comprehensive program as a project of the State of Washington the Grand Coulee Dam project on the Columbia River in said State and allotted and transferred the sum of $63,000,000 to the Bureau of Reclamation, Department of the Interior, to finance it, subject to a contract satisfactory to the Administrator between the United States and the said State; and by resolution of September 12 authorized the Bureau to expend $1,000,000 of said sum to finance certain preliminary work, said expenditure to be reimbursed by the States; and by resolution of October 17, reconsidered said resolution of July 27 and allotted and transferred the sum of $15,000,000 toward financing said project, subject also to such contract; and by resolution of October 24, authorized the Bureau to expend an additional $1,000,000 to finance certain other preliminary work, said expenditure likewise to be reimbursed; and the President has now directed that said project be included in the comprehensive program of Federal Public Works and financed as such:

Resolved that the Administrator and this Board reconsider all of such resolutions, and, reconsideration thereof having been had,

Resolved, further, that said project be included in the comprehensive program of Federal Public Works and that the sum of $15,000,000 be allotted and transferred to the [fol. 28] Bureau of Reclamation, Department of the Interior, to finance the construction of working quarters and facilities for engineers and other employes engaged in the preliminary investigation and preparation of plans and specifications for the dam, to finance the erection of a bridge across the Columbia River at the dam site, and to finance the execution by contract or otherwise of such additional work as the Director of the Bureau of Reclamation may deem appropriate.

March 14, 1934.

HTH.

[fol. 29] EXHIBIT "6" TO AMENDED COMPLAINT

(Symbol 11r-728)

United States

Department of the Interior

Bureau of Reclamation

Columbia Basin Project, Washington

Contract Between the United States and the Columbia Basin Commission of the State of Washington, Providing for Investigations, Plans and Estimates for the Columbia River Dam

This contract made this 30th day of June, 1933, between The United States of America, herein styled the United States, represented by the Commissioner of the Bureau of Reclamation, under the provisions of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, and the Columbia Basin Commission of the State of Washington as created by Chapter 81, Laws of Washington, 1933, herein styled the Commission.

Witnesseth;

2. Whereas, The United States and the Commission, separately and cooperatively, have heretofore conducted extensive investigations connected with the development of

the Columbia Basin Project, and more particularly in recent years, that plan of development contemplating the construction of a high dam in the Columbia River at the head of Grand Coulee, with pumping plants to deliver irrigation water to the head of an irrigation system contemplating the ultimate irrigation of about 1,200,000 acres, and

3. Whereas, under present economic conditions it may prove advisable to construct the Columbia River dam in two stages; the first stage to consist of a dam approximately 145 feet high above present low water with a power develop- [fol. 30] ment in connection therewith of approximately 700,000 installed horsepower and the second stage to consist of the raising and the completion of said low dam to an ultimate height of approximately 370 feet above low water or to a pool level of approximately 1287.5 feet above the sea, said low dam being useful in the ultimate construction of such high dam and enabling the development of a power market with a large reduction in initial investment and resulting carrying charges, and

4. Whereas, the Emergency Relief Commission created by chapter 8, Washington Laws 1933, did at a regular meeting duly held on June 29, 1933, unanimously adopted the following resolution:

"Whereas, Chapter 81, Laws of Washington, 1933, created a commission known as the Columbia Basin Commission having for its purpose the immediate development of the Columbia Basin project by means of the Grand Coulee Dam in the Columbia River, and the adjacent power plant, having for one of its purposes the providing of employment for the unemployed in the existing emergency, and

"Whereas, The United States of America, represented by the Commissioner of the Bureau of Reclamation has indicated willingness to contract for and proceed with the preliminary investigation and engineering necessary to the issuance of license, preparation of plans, and letting of contract for actual construction work on the said project, and

"Whereas, the said preliminary work and investigation will require a large amount of actual labor on the ground as well as office engineering work and will involve an expense estimated in the sum of not to exceed $377,000.00 and will be an important factor in relieving present unemployment in the state of Washington, both in the preliminary work and

in the possibility thereby produced of large construction work thereafter, and

"Whereas, the Columbia Basin Commission is not provided with funds or authority to expend funds or pledge credit or make any contract, involving financial commitments against the state of Washington, and

"Whereas, the Emergency Relief Commission is authorized and directed to cooperate with existing agencies either national, state or local for the purpose of carrying out its functions, and

"Whereas, both the preliminary work referred to herein and the Grand Coulee Dam project and power development are in fu-therance of the duties, plans and purposes of the Emergency Relief Commission and of the Columbia Basin Commission.

[fol. 31] "Now Therefore be it Resolved by the Emergency Relief Commission of the State of Washington that in fu-therance of its duties, ends and purposes and in accordance with the powers conferred upon it, the Emergency Relief Commission of the state of Washington does hereby make and constitute the Columbia Basin Commission an agency for the carrying out of the plans, duties and purposes of this commission to the extent hereinafter provided; and does hereby authorize and direct the Columbia Basin Commission and confer upon it the power to expend funds as herein appropriated and to make contracts as herein provided, in furtherance of the powers conferred upon the two commissions herein referred to.

"Be it Further Resolved that the Emergency Relief Commission does hereby allocate and appropriate to the Columbia Basin Commission the sum of $377,000.00, or so much thereof as may be necessary, to be used by the Columbia Basin Commission in meeting the obligations of that certain contract proposed to be enacted into by it with the United States of America, represented by the Commissioner of the Bureau of Reclamation; and the Emergency Relief Commission does hereby authorize and direct *and direct* that all other contracts necessary, incident and proper in furtherance of the general objects and purposes herein set forth, and the execution thereof by said Columbia Basin Commission shall be as valid and binding on the Emergency Relief Commission as if executed in the name of the Emergency Relief Commission itself, and as to all things

done under said contract and pursuant to this resolution the said Columbia Basin Commission shall be and is constituted an agency of this Commission and shall act both on its own behalf and under its own powers and also as an agency of the Emergency Relief Commission."

5. Whereas, the Commission desires the United States to make the necessary investigations of the most economic and practical construction of the Columbia River Dam in two stages and to prepare construction plans, estimates and specifications enabling contracts to be let for the construction of said low dam at the earliest practicable date and is willing to advance the necessary funds to cover the cost of the work connected therewith:

6. Now Therefore, The United States will, upon execution of this contract, proceed with the work herein contemplated, which work among other things, will include:

(a) Topographic surveys in the vicinity of the dam site.

(b) Investigation of concrete aggregates including tests for strength and suitability and determination of location and quantity available.

(c) Exploration of foundations at the dame site by drilling and test pits, it being agreed that said dam site shall be at the head of Grand Coulee in the Columbia River.

[fol. 32] (d) Designs and estimates for the low dam and power plant, with particular attention to adaptation of the dam to future raising to a pool elevation of approximately 1287.5 feet above sea level as contemplated in the reports by the chief engineer of the Bureau of Reclamation and by the Chief of Engineers of the United States Army, the work to include such studies and investigations of the designs of both the low and high dams as to secure development in two stages in the most practicable and economic manner.

(e) Preparations of designs and specifications for construction of the low dam and power plant.

(f) Investigation of power markets.

The items enumerated are not intended to represent the entire scope of the work contemplated by this contract, the extent and character of which will be governed by mutual agreement during the progress of the operations under this

contract and which may include services in matters connected with the perfecting of the plans of the Commission for the construction of the Columbia River Dam, including representations before the Federal Power Commission and other governmental bodies, having to do with the development of the natural resources of the country.

7. It is agreed that the United States Reclamation Service will inform a board of consulting engineers, consisting of three members appointed by the Columbia Basin Commission with the approval of the Governor, of the progress of the plans for the work to be done under this contract and consult with said board of engineers from time to time as the work progresses, it being understood that the United States Reclamation Service shall have final authority in determination of all plans for work done.

8. In all matters connected with the interpretation, modification or enlargement of this contract the Commission shall, when authority therefor is given in writing by the Commission, be represented by the Director of Conservation and Development or other duly authorized representative or representatives.

9, The work shall be under the direction of the Com- [fol. 33] missioner and the Chief Engineer of the Bureau of Reclamation and all employes engaged by the United States on these investigations, except as otherwise provided herein, shall be subject to the established rules and regulations of the United States Civil Service Commission. When mutually agreeable, persons may be employed for the work under this contract without regard to civil service status, either as to the United States or the State, and when so employed, shall be compensated by the Commission both as to salary or wages and expenses and the Commission shall be liable for any claims that may arise out of the employment of such persons, whose employment shall in any event cease when the work herein contemplated is completed. When desirable in the interest of efficiency and saving of time, supplies and services other than labor may be furnished by the Commission at its own expense.

10. During the progress of the work the Commission will insofar as requests are made therefor, and subject to the availability of funds, be supplied with reproductions of

any plans, surveys and studies that may be conducted pursuant to this contract. The originals of all data, designs, plans, estimates and studies resulting from these investigations shall remain in the custody of the Bureau of Reclamation in the office of its Chief Engineer; provided, however, that in the event construction of the Columbia River Dam shall be undertaken in behalf of the Commission by any agency other than the Bureau of Reclamation, such records shall then upon request of the Commission be relinquished to the Commission, but the Bureau of Reclamation may retain copies thereof.

11. The gross expenditure contemplated by this contract shall be limited to Three Hundred Seventy-seven thousand dollars ($377,000.00). The Commission will upon execution of this contract deposit with the Special Fiscal Agent of the Bureau of Reclamation at Denver, Colorado, fifty thousand dollars ($50,000). Additional sums will be deposited [fol. 34] from time to time by the Commission as requested by the representatives of the United States, but the United States shall cease work under this contract whenever funds advanced therefor are exhausted. The cost of the work will include payments for field expenses and personnel, consulting and other services, and general expense of the Bureau of Reclamation. There shall also be charged against such advances, expenditures that have been made by the United States since April 1, 1933, for the cost estimate of the low dam and for maps and plans prepared in connection with applications made before the Federal Power Commission. Upon completion of the work, or in the event the same shall be terminated prior thereto, either because of lack of funds or by mutual agreement between the United States and the Commission, the United States will refund to the Commission the remainder, if any, of the funds deposited by the Commission after all outstanding liabilities shall have been liquidated.

12. The United States will, other conditions being equal, in the conduct of the work, give preference in employment to individuals, engineers and concerns resident in the State of Washington.

13. No member of, or delegate to Congress, or resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom. Noth-

ing, however, herein contained, shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties have hereunto signed their names the day and year first above written.

The United States of America, by Elwood Mead, Commissioner, Bureau of Reclamation. The Columbia Basin Commission, by E. F. Banker, Chairman.

Attest: James O'Sullivan, Secretary of Commission.
Approved: The Emergency Relief Commission, by Frank S. Baker, Chairman. (Seal.)

[fol. 35] EXHIBIT "7" TO AMENDED COMPLAINT.

(P. O. Draft; Oct. 20, 1933)

United States,

Department of the Interior,

Bureau of Reclamation

Grand Coulee Project, Washington

Contract Between the United States of America and the State of Washington Acting Through the Columbia Basin Commission

This Agreement, made this first day of November, 1933, in pursuance of the act of June 17, 1902, (32 Stat., 388) and acts amendatory thereof or supplementary thereto, referred to herein as the Reclamation Laws, and of the act of June 16, 1933 (48 Stat., 125) commonly known as the National Industrial Recovery Act, between the United States of America, represented by the Secretary of the Interior, and the State of Washington, represented by that certain agency of the said state known as the Columbia Basin Commission, created under Chapter 81 of the 1933 Washington Laws.

Witnesseth That:

2. Whereas brevity is desirable, the following are hereinafter styled as listed in Column 1 hereof, in lieu of the full name or title listed in column 2 hereof:

Column 1	Column 2
United States	United States of America
Secretary	Secretary of the Interior
NIRA	National Industrial Recovery Act
State	State of Washington
Commission	Columbia Basin Commission
Project	Grand Coulee Project

and

[fol. 36] 3. Whereas, an allotment of $63,000,000 out of the fund appropriated under the NIRA has been made available for the construction of a dam and power plant by the Reclamation Bureau at the Grand Coulee site on the Columbia River in the said state and such transmission lines in connection therewith as may be found necessary or desirable;

4. Whereas, the said dam to be constructed with said allotment constitutes the first unit and an integral part of a larger Grand Coulee Dam which is more fully described in the reports of the Chief of Engineers of the War Department and the Reclamation Bureau as set out and discussed in the "Hearings before the Committee on Irrigation and Reclamation of the House of Representatives of the Seventy-second Congress on the Columbia Basin Project, H. R. 7446", which said dam will provide about 5,000,000 acre-feet of storage capacity, create a lake 151 miles long extending from the Grand Coulee to the Canadian line, and serve as the diversion dam for said project and for improvement of navigation, flood control, power development, and ultimately for irrigation, including the irrigation of public lands of the United States; and

5. Whereas, under appropropriation made for that purpose by Congress, the Corps of Engineers, United States Army, have conducted exhaustive investigations of the Columbia River for the purpose of determining the best use of the said stream and its tributaries for the various purposes to which it is adapted, and have adopted a comprehensive and coordinate plan for the development and use of said stream for navigation, flood control and irrigation and for the development of electrical energy to pay the cost of the proposed construction and for irrigation pumping and industrial and domestic use; and

[fol. 37] 6. Whereas, the said comprehensive plan for the co-ordinated development of the Columbia River for navigation, flood control, power and irrigation includes the construction of a series of dams at various points on the Columbia River, the uppermost of which is the said Grand Coulee Dam; and

7. Whereas, the said Grand Coulee dam is the key structure in the comprehensive plan for the coordinated development of the said stream, in that the said Grand Coulee Dam will provide the necessary storage capacity to store the peaks of the Columbia River floods and, by storing the floods and releasing the stored water during the low water season, will improve the flow of said stream for navigation, power development and irrigation and will reduce the flood dangers on the lower part of the stream; and

8. Whereas, it is estimated that the storage to be made available behind the said Grand Coulee dam will about double the amount of firm power which can be developed at each of the proposed dam sites between the Grand Coulee and the mouth of the Snake river and will increase by about 50% the amount of firm power that can be developed at each of the several dam sites below the mouth of the Snake; and

9. Whereas, the said increased amount of firm power made possible at each of said lower dams by reason of the storage behind the Grand Coulee dam is an important factor in the feasibility of each of said lower dams as a self-liquidating project; and

10. Whereas, the said Commission has been created by the Legislature of said state as a state agency for the purpose of cooperation with the federal government in securing the construction of the said project and the said Grand Coulee dam;

Now, therefore, it is hereby agreed:

[fol. 38] 11. Construction of First Unit.—Upon approval of the plans and specifications for the said proposed first unit dam of the project by the chief engineer of the reclamation bureau, the United States acting through the Reclamation Bureau and under the direction of the secretary will expend the sum of sixty million dollars ($60,000,000) or so much thereof as the secretary shall find to be necessary for

that purpose, in the construction of a dam and power plant at the said Grand Coulee site, the top of which dam will be approximately at elevation 1116, and spillway crest thereof, at approximately elevation 1085 feet above sea level, and will expend the sum of three million dollars ($3,000,000) or so much thereof as the secretary shall find to be necessary or advisable in the construction of transmission lines for the marketing of the electrical energy to be produced at said dam.

12. Title to Constructed Works.—The United States will retain the title to the said dam and power plant and the operation and control thereof until the cost of the said project, including the cost of the said first unit dam and power plant, has been fully repaid into the treasury of the United States.

13. Commission to Act in Advisory Capacity.—The Commission will act as an advisory board representing the state in an advisory capacity in conferences with officers of the United States concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines.

14. Option to State.—The State, acting through the said Commission, or other duly authorized state agency, shall have an option, for a period of three and one-half (3½) years from the date hereof, to purchase the perpetual right to the entire power output of the said first unit dam and power plant by issuing and delivering to the United States valid general obligation bonds of the State in the amount of seventy per cent (70%) of the estimated cost of the said [fol. 39] first unit dam, power plant and transmission lines as the said cost is estimated and announced by the secretary in the manner hereinafter provided, subject, however, to the following terms, conditions and reservations. The principal of the said bonds shall come due in not to exceed 30 years and shall bear interest at the rate of four per cent (4%) per annum. It is further agreed that for a period of five years after the expiration of said three and one-half (3½) years option period, the state shall have a further and additional option to purchase the said perpetual right to the entire power output of said first unit dam and power plant at the same price and upon the same terms and conditions applicable to said 3½ year option; but subject to

the additional condition, that if the state should exercise the option after the expiration of said 3½ year period, then the state will take said power rights subject to any contracts for the sale of power from said plant which the United States may have made prior to the exercise of the option by the state and the rights, benefits, duties and obligations of the United States under such previously made power sale contracts shall inure to the benefit of and be binding upon the state as the successor of the United States thereunder.

15. Estimate of Cost of First Unit.—When the Commission shall have advised the secretary that the necessary legal authority has been secured to issue and deliver the said bonds and that the state desires to exercise the option provided for herein, the secretary will furnish the commission an estimate of the cost of the first said unit dam and power plant and the transmission lines to be constructed in connection therewith, based upon the costs theretofore incurred plus an estimate of the cost of completing the said works, which statement and estimate of cost shall include all expenditures of whatsoever kind in connection with, growing out of, or resulting from the work described, including the cost of labor, material, equipment, engineering and legal [fol. 40] work, superintendence, administration and overhead, right of way, property, and damage of all kinds, shall include all sums expended by the United States in surveys and investigations, both prior to and after the execution of this contract. The said estimate shall be in writing, duly signed by the secretary, and shall be conclusive for the purpose of the option provided for herein.

16. Enlargement, Alteration or Improvement of Works.—The United States reserves the right to enlarge, alter and improve the said first unit dam and to enlarge, alter, improve and modify the said power plant and to change the machinery therein to adapt the same to the higher head available from such enlarged dam, and to add other or additional power plants or power units, and the right to use the enlarged dam and the enlarged or modified power plant in connection therewith for all the purposes for which said larger dam is intended, including improvement of navigation, flood control, power development, and irrigation.

17. Right to Seasonal Power.—The United States reserves the right to such part of the seasonal power available from

said enlarged dam during the irrigation season as may be needed for pumping water for the said project.

18. Estimate of Available Power.—In connection with the said estimate of cost to be furnished by the secretary, the secretary will also furnish as estimate of the amount of firm power and the amount of seasonal power which may reasonably be expected from said first unit dam and power plant, and after the construction of the enlarged dam and the improved or enlarged power plant the United States retains the right to all power or electrical energy which can be developed at said enlarged dam and power plant in excess of said estimate of power available from said first unit dam and power plant and after said enlargement the power rights of the state will be limited to the said estimated power output [fol. 41] estimated to be available from said first unit dam and power plant; but it is agreed and understood that enough of the seasonal power available from said enlarged dam and power plant during the irrigation season to supply the pumping requirements of the project is reserved by the United States even though such reservation should encroach somewhat upon the estimated seasonal power output of said first unit dam and power plant.

19. Payment of Operation and Maintenance.—If the state exercises the option herein granted and acquires the right to the power output of said first unit dam and power plant, the state will each year, in addition to the payment of the principal and interest provided in said bonds, pay to the United States the cost of the operation and maintenance of the said first unit dam and power plant and transmission lines in connection therewith, as set out and determined by a statement of such cost to be furnished each year by the secretary to the commission until the enlargement of the said dam and power plant; and after the enlargement of said dam and power plant will pay a proportionate part of the cost of the operation and maintenance of the said enlarged dam and power plant, in proportion to the number of kilowatt hours of electrical energy secured by the United States and the state respectively from the said enlarged dam and power plant, and also a proportionate part of the cost of the operation and maintenance of such transmission lines as are used jointly by the United States and the state in proportion to the amount of electrical energy transmitted over such lines by each party. The said operation and

maintenance charges shall be determined and paid in the following manner.

On or before December 1st of each year after the state has exercised the option granted herein and after power has become available from said first unit dam, the secretary will furnish the commission an advance estimate of the probable cost of the operation and maintenance of the said dam, power plant and transmission lines for the coming [fol. 42] calendar year from January 1 to December 31, inclusive, following next after the date of said estimate, and after the enlargement of said dam and power plant will also include in said advance estimate an estimate of the state's proper pro rata share of such operation and maintenance cost and expense according to the proportion herein provided for, which cost shall include all the elements of cost listed in article 15 hereof, and on or before January 1 following the date of said estimate, the state will pay to the United States the amount of the said estimated cost of operation and maintenance chargeable to the state as shown by and set out in said advance estimate, which shall be considered conclusive for this purpose.

Within ninety (90) days after the close of the year for which such payment has been made on such advance estimate basis, the secretary will furnish the commission a statement of the actual cost and expense of such operation and maintenance for the said past year, including all of the items of expense listed in article 15 hereof, and after the enlargement of said dam and power plant will also include in said statement a statement of the state's proper pro rata share of said operation and maintenance cost, which statement by the secretary shall be considered conclusive for the purposes of this contract.

Within thirty (30) days after delivery of such statement of actual cost and expense of said operation and maintenance during the preceding year, the state will pay to the United States, or the United States will refund or credit to the state, such amount of money so that the total amount paid by the state to the United States as finally adjusted for each year's operation and maintenance of said works shall be the actual cost of the operation and maintenance of said works as shown by the said statement of actual cost up to the time of the enlargement of said dam and power

plant, and after the enlargement shall be the state's proper [fol. 43] pro rata share of such actual cost as shown by said statement of actual cost.

20. Interest on Overdue Payments.—All charges herein agreed to be paid by the state to the United States which are not paid when due shall bear interest from the due date thereof until paid at the rate of six per cent (6%) per annum.

21. Default in Payment.—Should the state after exercising the option provided for herein, default in the payment of the principal or interest of said bonds or any part thereof, or any operation and maintenance charge herein agreed to be paid, the United States shall not be obliged to furnish any power to or from the state from said dam and power plant during the time that the state remains in default, and should such default continue more than two (2) years the United States may, at its option, by notice from the secretary to the Commission, terminate all rights of the state and of the commission in said dam, power plant and transmission lines, and all rights of the state and of the commission under this contract as fully and completely as if this contract had never been made, but after such termination shall return said bonds to the state upon the payment by the state of all interest accrued thereon up to that time and all past due indebtedness of the state to the United States for operation and maintenance charges.

22. Rights if State Fails to Exercise Option.—Should the State decide not to exercise the option herein granted or allow the said option periods from the date thereof to elapse without the exercise of said option, the United States shall retain all rights in the said dam, power plant and transmission line and the power output thereof and the right to use, distribute, sell or dispose of all electrical energy developed at said dam and power plant in such manner as the United States may deem best to pay the cost of the said project and accomplish the other purposes for which said project is intended.

23. United States not Liable for Damages.—The United [fol. 44] States, its officers, agents or employees shall not be liable for damages when, for any reason, suspensions of the operation of the power system of the United States, or any part thereof, interfere with the delivery of electrical

energy to the commission. The United States shall have the right to shut down its power plant and/or transmission lines and to cease the delivery of electrical energy temporarily whenever it shall be necessary to make repairs, replacements or additions to its power plant, transmission lines, substations, dams or canals. Whenever possible, the United States will give reasonable advance notice of such temporary suspensions of service and will make all such repairs, replacements, and additions with diligence and will resume service without undue delay.

24. Rules and Regulations by Secretary.—The Secretary shall have the right to adopt and promulgate rules and regulations for the administration of the said project and the right to determine and decide all questions arising in connection with or growing out of the construction or operation and maintenance of said proposed dams, power plants and transmission lines and which are not expressly determined by law or the terms of this contract, and his decisions on such questions shall be conclusive.

25. Officials not to Benefit.—No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

United States of America, by —— ——, Secretary of [fol. 45] the Interior. State of Washington, by The Columbia Basin Commission, by —— ——, Chairman, by —— ——, Secretary.

Attest: —— ——. (Seal.)

[fol. 46] EXHIBIT "8" TO AMENDED COMPLAINT

This Contract made and entered into this — day of September 1934, by and between Silas Mason Company, Inc., a corporation organized and existing under the laws of the State of Delaware, Walsh Construction Company, a corporation organized under the laws of the State of Iowa, and

Guy F. Atkinson, George H. Atkinson, W. E. Kier and E. L. Kier, partners, doing business under the firm name of Atkinson-Kier Co. (hereinafter referred to as the Contractors"), and Mason-Walsh-Atkinson-Kier Company, a corporation organized under the laws of the State of Delaware (hereinafter referred to as the "Agent"), Witnesseth:

Whereas, the contractors under date of June 18, 1934, made and submitted to the Government of the United States their joint bid for the construction of what is known as the Grand Coulee Dam and Power Plant in the State of Washington, together with such other work in connection therewith indicated on the drawings accompanying said bid or required by the specifications pertaining thereto, and such incidental work as needed or required in writing by the contracting officer; and

Whereas, said joint bid so submitted by the Contractors was the lowest bid submitted, and was approved and accepted by R. F. Walter, Chief Engineer, Reclamation Bureau, on July 16, 1934, notice of which acceptance was given to the Contractors by telegram dated July 16, 1934, received by the Contractors on July 17, 1934; and

Whereas, the Contractors propose to execute the formal contract for the prosecution of said work designated as P. W. A. 51, and wish to prosecute said work to completion without any assignment of the contract obligations; and

Whereas, the Agent desires to act as the Agent of the Contractors in carrying out the said contract and in furnishing the necessary labor and materials in connection therewith, but not in any way as the assignee of said contract or as [fol. 47] having any interest therein; and

Whereas, the Agent is a corporation, the control of which is vested or is proposed to be vested through stock ownership held by said Contractors, and the executive officers of the Agent have been selected from the executive officers of the Contractors, and it is intended that the prosecution of said work shall be under the control and direction of the Contractors;

Now, Therefore, this Agreement Witnesseth: That the Contractors agree to constitute, appoint and employ the Agent in the prosecution of all work necessary to be done in the fulfillment of the contract described in the preamble hereof, and the Agent agrees to furnish working capital necessary for the performance of the contract and also to provide funds or securities as may be necessary for and

make deposit in escrow thereof for the indemnification of the sureties on the bond for the faithful performance of the contract and to do all things necessary to carry out said contract according to the true meaning and intent thereof, and to furnish all necessary labor and materials to fulfill and carry out said contract within the time specified therein and in accordance with the plans and specifications thereof and to pay all costs and expenses of every kind and nature incident to the complete fulfillment thereof

In Consideration Therefor the Contractors agree to pay the Agent as remittances are received from the Government of the United States by said Contractors, sums equal to the amouuts of such remittances for work done under said contract, such payments to be made by the Contractors forthwith upon their Receipt from the Government of the United States. It being intended that there shall be paid to the Agent in discharge of its obligations hereunder, sums aggregating the total consideration received by the Contractors from the Government of the United States in payment for and in fulfillment of their obligations under the aforesaid contract, diminished however, by any offsets, penalties or diminutions in the contract price from whatsoever cause. [fol. 48] The Agent shall make all disbursements for all costs and expenses incident to the carrying out of the aforesaid contract, and shall render a true accounting thereof to the Contractors upon demand. Any excess of the remittances received by the Agent, pursuant to the provisions hereof, over and above the costs and disbursements incident to the performance by the Agent of its obligations hereunder shall be and remain the property of the Agent.

The Contractors hereby designate the Treasurer of the Agent as their agent for the purpose of receiving from the Government of the United States in the name of the Contractors all monies due upon the aforesaid contract, and the executives of the Agent shall act as the agents and representatives of the Contractors in reference to all transactions by the contractors and the Government of the United States in connection with the aforesaid contract.

Nothing herein shall be construed to effect an assignment of the aforesaid contract by said Contractors or the relinquishment in any manner whatsoever of their obligations thereunder.

In Witness Whereof the corporate parties have caused this agreement to be executed by their duly authorized

officers and their corporate seals to be affixed by like authority and the copartnership party has caused this agreement to be executed by one of the partners and sealed, the day and year first above written.

Silas Mason Company, Inc., by —— ——. Walsh Construction Company, by ——. ——.

Attest: —— ——.

Attest: —— ——.

[fol. 49] Atkinson-Kier Co., by —— ——, a Copartner. (L. S.) Mason-Walsh-Atkinson-Kier Company, by —— ——.

Attest: —— ——.

[fol. 50] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER TO FIRST AMENDED COMPLAINT—Filed October 29, 1935

Come now defendants above named and answering plaintiffs' first amended complaint allege:

I

Referring to paragraph one thereof defendants admit that Silas B. Mason Company, Inc., is a Delaware corporation and that Walsh Construction Company is an Iowa corporation but allege that both of these corporations carry on within the State of Washington the business for which they are organized; that neither of said corporations have qualified to transact such business within the State of Washington and that neither of said corporations have paid to the State of Washington the fees required so to qualify; that said Silas B. Mason is an officer to the Silas Mason Company, Inc., representing said company in the state of Washington; that said Silas B. Mason is and has been a resident of the state of Washington; that T. J. Walsh is an officer of the Walsh Construction Company, a corporation, representing said company in the State of Washington; That said T. J. Walsh is and has been a resident of the state of Washington.

[fol. 51] Defendants admit that Atkinson-Kier Company is a copartnership consisting of Guy F. Atkinson and George H. Atkinson, William E. Kier and Elmer L. Kier and that Guy F. Atkinson is and has been a resident of the state of Washington and that the performance of the work under the contract referred to in paragraph six of plaintiffs' amended complaint was commenced in the state of Washington by said Guy F. Atkinson under the name and style of Guy F. Atkinson Company, prior to the organization of Mason-Walsh-Atkinson-Kier Company, a corporation.

That on or about the 10th day of October, 1934, Silas B. Mason, T. J. Walsh, Guy F. Atkinson and W. A. Hanger, describing themselves as residents of the state of Washington with offices in the Peyton Building at Spokane, Washington, organized the "Coulee Trading Company", a Washington corporation for the purpose of operating a general store at Mason City in Grant County and at other points in the state of Washington and that said corporation is now in good standing.

Defendants admit that Mason-Walsh-Atkinson-Kier Company is a Delaware corporation and that the same has qualified to do business in the State of Washington and has paid its annual license fee last due to the state of Washington. In this respect the allegations of paragraph eight of defendants' answer to plaintiffs' original complaint while true and correct at the time pleaded, are not now correct. The Mason-Walsh-Atkinson-Kier Company paid its first license fee on the basis of a $500,000 capitalization only, but it has paid its last annual license fee on its total capitalization of $5,000,000 which is the correct basis. The State of Washington asserts no further claim against the said corporation and the Mason-Walsh-Atkinson-Kier Company is entitled to do business in the state of Washington.

That Silas Mason Company, Inc., Walsh Construction Company and Mason-Walsh-Atkinson-Kier Company, originally commenced to do business in the state of Washington [fol. 52] with offices at 342 Peyton Building, Spokane, Washington, where said corporations transacted their business until their offices were moved nearer the damsite and it is alleged on information and belief that their offices are situated in Mason City, Washington.

That it was necessary for each of said corporations to

transact business in the state of Washington from their Spokane offices before actual construction work could be commenced at the damsite and that since the actual construction work has commenced the activities of each of said corporations have been necessarily confined to the state of Washington with the exception of the letting of sub-contracts for or the purchase of materials and equipment outside of the state of Washington but that even in this respect the said corporations were required by the terms of the contract and actually did confine their purchases to the state of Washington and did distribute them as generally as possible over the entire state.

II

Referring to paragraph 7 thereof defendants allege on information and belief that certain work was done in connection with the performance of the contract referred to by Guy F. Atkinson Company, prior to the formation of plaintiff Mason-Walsh-Atkinson-Kier Company, a corporation.

III

That the contract involved in this case was executed on behalf of the United States of America by R. F. Walter, Chief Engineer of the Bureau of Reclamation of the department of the interior and is the standard unit price contract used by the government in contract work and that under said contract plaintiffs are independent contractors.

[fol. 53] That some of the provisions of the contract and specifications are referred to in paragraph eight of plaintiffs' first amended complaint. That defendants desire the contract, specifications and provisions to be considered as a whole; that all of the provisions and specifications of the said contract are general and such as are used by the government in all instances where the relation of independent contractor was to be created.

Defendants call the court's attention to the following specific provisions of the contract for the purpose of showing that the federal government required the contractors to be subject to the jurisdiction of the state of Washington.

(a) Article 10 on page 5 of the contract requires the contractor to obtain all required licenses and permits. Among

other licenses plaintiffs actually and necessarily obtained licenses and permits from the state of Washington, through its department of licenses, for the operation of its oversized equipment on state highways and plaintiff Mason-Walsh-Atkinson-Kier Company obtained a distributor's license for use at Mason City from the Washington State Liquor Control Board.

(b) Article 21 on page 7 of the contract involved in this case which is form No. PWA 51 and which was executed on July 16, 1934, is as follows:

"Compensation Insurance.—The contractor will furnish compensation insurance for employees on this work and comply with the workman's compensation laws of the state, territory, or district in which the work is to be performed, and will give proof of such adequate insurance satisfactory to the contracting officer."

On July 19, 1934, a bulletin embodying certain changes in contract form No. PWA 51, was issued by Harold S. Ickes, administrator of the Federal Emergency Relief Administration of Public Works. This order provides:

[fol. 54] "The following will be substituted for article 21:

" 'Compensation Insurance.—The contractor shall provide adequate workmen's compensation insurance for all labor employed on the project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the contracting officer shall be given.' "

That plaintiff Mason-Walsh-Atkinson-Kier Company promptly qualified under the Washington Industrial Insurance Act and actually complied with said law by filing monthly pay-rolls and paying the monthly premiums and that Silas B. Mason, T. J. Walsh, Guy F. Atkinson, M. J. Whitson and W. A. Hanger, the officers of the Mason-Walsh-Atkinson-Kier Company have elected to come under the said act and are now covered by the Washington Industrial Insurance Act.

(c) Specifications promulgated by the Bureau of Reclamation in the Department of the Interior of the United

States, numbered 570, pertain to the Columbia Basin Project in the State of Washington and govern plaintiffs in the performance of their contract. These specifications are by this reference made a part of this answer.

(d) Specification No. 35 to be found on page 27 governs the construction of the contractor's camp. It contains the following statement:

"* * * Regardless of the approval of the contracting officer, the contractor shall comply with all the laws and regulations of the state of Washington or any agency or subdivision thereof, which affect the building, maintenance, or operation of the contractor's camp, and shall be responsible for any and all damages or claims resulting from inadequate or improper camp facilities. * * *"

This provision was incorporated in the specifications notwithstanding the fact that the government undertook to acquire the right of way for the construction of said camp (specification No. 4).

[fol. 55] (e) Specification No. 38, referring to Sewer and Sanitation, provides that the discharge of sewage into the Columbia River shall conform to the laws and regulations of the Department of Health for the state of Washington, and provides:

"* * * All garbage and refuse shall be regularly collected at such intervals as may be approved by the contracting officer or by the proper state of local regulatory authority, and shall be disposed of by burying, incineration, or otherwise as approved by the contracting officer."

(f) Specification No. 42, to be found on page 29, requires the contractor to make all necessary arrangements with the proper state and county authorities for school facilities and instruction for families of the contractors, employees and other residents in the camp site; This has been done and the state of Washington, through its proper department and subdivisions, actually maintains and has jurisdiction over proper schools in both the engineer's and contractor's camp.

(g) Specification No. 43, with reference to police protection, provides that police protection for the contractor's camp and the area involved in and surrounding the con-

struction work, will be furnished by the Washington State Patrol in cooperation with the government and the state of Washington, through its State Patrol in cooperation with county peace officers, have actually policed the entire area involved in and surrounding the construction work covered by the contract.

(h) Specification No. 50 refers to the locations of existing state roads in the vicinity of the work which are to be used by the contractor and the state of Washington through its department of highways, in cooperation with the proper county officials, has actually furnished and exercise complete jurisdiction over state roads leading to and from the damsite.

(i) Specification 51 requires the contractor to operate a railroad which was to be constructed by the Government from Odair to the damsite, a distance of about 30 miles [fol. 56] and the contractor is also required to transport materials either from or to Odair for either the government itself or other contractors engaged on any work which was a part of the Columbia Basin Project and the contractor was required to and did bid on such work, the transportation to be by truck over state highways prior to the completion of the railroad.

(j) Specification No. 52 refers to the substation of the Washington Water Power Company at Coulee City, Washington, as a possible source of electrical energy, the contractor being required to construct a transmission line from Coulee City to the damsite.

IV

Referring to paragraph 9 thereof, defendants admit that plaintiffs entered upon the performance of said contract and are now engaged in the performance thereof; admits that the actual co struction work is being done partially on lands acquired by the federal government from private parties with moneys made available under the National Industrial Recovery Act of 1933, but denies that the complete performance of the contract can be accomplished on said lands and alleges that the land upon which the completed structure will rest is a very small portion of the lands necessary for the authorized project. That the lands necessary for the entire project embraces a large amount of

public lands either owned by the government in its proprietary capacity or held in trust for Indians. That it includes a large amount of lands belonging to the state of Washington either held in fee or in trust for schools and that it also includes lands held by Lincoln and Ferry counties. That in order to carry out and perform the said contract plaintiffs did maintain offices and transact necessary business in Spokane county, Washington. That in order to carry out and perform said contract it was necessary for plaintiffs to operate special equipment over the highways of the state of Washington by special permit of the State of Washington. That while plaintiffs may not be [fol. 57] engaged in any other business than contracting the individual officers thereof have formed themselves into a corporation which is authorized to and does transact a general trading business in the state of Washington at Mason City, Washington.

V

Referring to paragraph 10 thereof defendants admit that plaintiffs are taxable in respect to their business of contracting under the provisions of Chapter 191, Laws of Washington for 1933, as amended by Chapter 57, Laws of Washington, ex sess. 1933, and that they are also so taxable under title II, chapter 180, Laws of 1935. Defendants admit that they have made demand for the payment of the tax but denies that the state of Washington will impose or attempt to impose upon plaintiffs any extraordinary remedies, pains or penalties which may be provided by any of said acts or which might in any way tend to hinder or embarrass plaintiffs in carrying out their said contract.

VI

Referring to paragraph 11 thereof defendants deny each and every allegation therein contained and allege that plaintiffs are acqually engaged in the business of contracting in the state of Washington; that the relationship existing between plaintiffs and the federal government is that of independent contractor and that plaintiffs are in no sense federal agencies but are engaged in a private business for gain; that the federal government holds the lands acquired by it from private parties in trust for the necessary carrying out of the completed project in its proprietary rather than its

governmental capacity and that the state has not abandoned jurisdiction over said lands nor has the federal government assumed jurisdiction over them.

VII

Defendants deny the allegations contained in paragraph 12 thereof.

[fol. 58]

VIII

That the state of Washington has assisted the federal government in acquiring lands for the said Columbia Basin Project and has performed certain work on said project and furnished moneys to the federal government to conduct other work; that the details of the activities of the state of Washington are set forth in the exhibits attached to plaintiffs' complaint and in the first and second reports of the Columbia Basin Commission of the State of Washington referred to in plaintiffs' complaint.

IX

That by reason of the carrying out of their said contract the plaintiff, Silas Mason Company, Inc., a Delaware corporation and plaintiff Walsh Construction Company, an Iowa corporation, are doing business in the state of Washington without having qualified so to do

Wherefore, having fully answered plaintiffs' amended complaint, defendants pray that the same may be dismissed and this court enter its decree declaring that plaintiffs are subject to the payment of the Washington Occupational Tax of the state of Washington under the provisions of chapter 191, Laws of 1933, as amended by chapter 57, Laws of 1933 ex. sess. and entitled to the tax under chapter 180, Laws of 1935, and that defendants have such other and further relief as may be proper in the premises.

—— ——, Attorney General. —— ——, Assistant Attorney General.

[fol. 59] *Duly sworn to by E. P. Donnelly. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 60] [File endorsement omitted]

[fol. 61] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

REPLY—Filed October 16, 1935

For reply to the defendant's answer plaintiffs

1. Deny the affirmative matter pleaded in paragraph III of said answer, except they admit that the Silas Mason Company Inc., Walsh Construction Company and Mason-Walsh-Atkinson-Kier Company had offices in the Peyton Building, Spokane, Washington, prior to the beginning of construction work on the dam, which is the subject of the contract pleaded in the complaint herein, and that from such offices they transacted such business as was necessary to be done while the arrangements were being made to commence work on the dam. In that respect they allege that they did no other business in such offices than such as was preliminary to beginning work under their contract.

2. Admit that the particular contractual provisions set forth in paragraph III of the answer were contained in the contract for the construction of the Grand Coulee Dam, which plaintiffs entered into, and that plaintiffs have performed such provisions in accordance with the terms of the [fol. 62] contract. Admit, also, that they have complied with such provisions of the police laws of the state of Washington as would affect citizens of that state other than those residing within the reservation ceded to the United States, which is pleaded in the complaint. Deny other affirmative matters pleaded in the third paragraph.

3. Deny the affirmative matter pleaded in paragraph IV of the answer save that plaintiffs admit they maintained offices in Spokane county, Washington, where business essential to beginning the construction of work under the dam contract was transacted, and admit that they have obtained such permits as were necessary for the operation of equipment over the highways of the state of Washington, and admit the formation of a corporation by individual officers of plaintiffs which is transacting a general trading business at Mason City, Washington. In respect of the last admission they allege that Mason City is situated within the

bounds of the reservation ceded to the United States by the state of Washington, as pleaded in the complaint.

4. Deny each and every allegation made and contained in paragraph VI of the answer.

5. Deny each and every allegation contained in the ninth paragraph of the answer.

Wherefore, plaintiffs pray as in their amended complaint.

Graves, Kizer & Graves, Attorneys for Plaintiffs.

[fol. 63] *Duly sworn to by W. G. Graves. Jurat omitted in printing.*

[fol. 64] IN SUPERIOR COURT OF THURSTON COUNTY

No. 15850

SILAS MASON, INC., et al., Plaintiffs,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON et al.

MEMO. OPINION—Filed November 18, 1935

This action was brought to enjoin the collection of a tax sought to be laid under the provisions of chapter 191 Laws of Washington, 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session 1933. The tax in controversy is denominated in the original act as "an annual tax or excise for the privilege of engaging in business activities." The right to impose a tax upon plaintiffs is claimed under the Amendment Chapter 57, Laws of Extraordinary Session 1933, page 157, which provides for the collection of a tax measured by the gross income of business "from every person engaging or continuing within the State in the business of rendering or performing services."

Plaintiffs are citizens and residents of states other than Washington and are within this state for the sole purpose of performing the contract with the United States Government in the construction of Grand Coulee Dam and power plant, a part of the Public Works system of the United States embraced within what is known as the Columbia River project.

Plaintiff resists the enforcement of the tax for two reasons: First, because the contract is with the federal government and that the tax is a tax on the contract and therefore an attempt to tax a Federal instrumentality; second, [fol. 65] that the operations of the plaintiff are without the jurisdiction of the State, namely in territory ceded by the state to the Federal Government.

In support of the contention that the state cannot tax the contract with the United States, plaintiffs rely upon cases involving the tax upon leases of Indian oil lands.

Indian Oil Company v. Oklahoma, 240 U. S. 522;
Gillespie v. Oklahoma, 257 U. S. 501:

and other like cases;

Those cases in my judgment, are not in point. In those cases it was held that the imposition of the tax was upon property under the protection of the federal government; that the holders of the leases were agents of the government and that the tax was upon an instrumentality through which the United States was performing its duty to the Indians.

Plaintiffs also rely upon a line of cases in which attempts were made by the state to tax National Banks in their various activities beginning with the case of

McCulloch v. Maryland, 4 Wheaton, 316, and running through a long line of more recent cases. In all those cases the banks were held to be Federal agencies carrying out certain functions of the Federal Government.

In the case of Weston v. Charleston, 2-Pet. 448, for instance, the United States had borrowed money and had issued, as evidence of the debt, some form of obligation referred to as stock. The city of Charleston undertook to lay a tax upon the stock and it was held that it could not be done because it was a tax upon the power of the Government to borrow money.

While in all those bank cases, the relations between the government and the agencies attempted to be taxed are referred to as contracts, they, in a very definite sense, differ from the contract involved here. It is pointed out that the state may tax the property of the agent, but not its activities in carrying out the governmental functions.

[fol. 66] The agents of the government are only exempt from State legislation in so far as that legislation may in-

terfere with or impair their efficiency in performing the functions for which they are designed to serve.

First National Bank v. Kentucky, 9 Wall, 353.

The exemption is dependent, not upon the nature of the agents or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does, in truth, deprive them of the power to serve the Government as they were intended to serve it or does hamper the efficient exercise of their power.

Union Pacific Railroad Co. v. Peniston, 18 Wall, 36.

Plaintiffs here hold a contract for the purpose of performing certain construction work. It was obtained by competitive bids. It would be the same in every respect if it were entered into with a private person so far, as its purposes are concerned. They are independent contractors performing the work for a definite price which the Government has agreed to pay and they have agreed to accept for the work performed. The Government is in no way affected by the fact that they pay or do not pay the tax any more than the government could be affected by the payment of a tax upon their trunks or machinery. They do not fall within the class of cases upon which they rely.

In Trinity Farm Company v. Grosjean. 291 U. S., 466. a contractor with the government for the construction of levees on the Mississippi River was held to be an independent contractor and not a Government instrumentality, and that the tax upon the gas used in operation on the contract had only a consequential or remote effect upon the government.

Those cases relied upon by the plaintiffs deal with acts of officers or employees in the exercise of Governmental functions and the cases are unanimous in holding that in so act- [fol. 67] ing they are not subject to revenue or police laws of the state. The case of a corporation contractor for the construction of public works is one in which, if it may be said to be an instrumentality of the Government at all, its relations to the Government are nevertheless contractual. It does not exercise Government functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and

similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying.

The distinction endeavored to be made here is clearly demonstrated, I think, in a comparison of the Spruce Production Corporation case, Clallam County versus the United States, 263 U. S. 341, with the case at bar. There it was pointed out that the corporation was organized by the United States as an instrumentality for carrying on the war. The case at bar is one of a corporation having its own purposes, as well as those of the United States, and interested in profit on its own account.

In General Construction Company versus Fisher, 39 Pacific, 362, an Oregon case, plaintiff had entered into a contract with the United States Government to furnish labor and material for the construction of a dam and irrigation works in connection with an irrigation project in eastern Oregon. The state of Oregon had levied a tax upon the income of plaintiff from its operations. After reviewing the facts and numerous cases, the Supreme Court of Oregon concluded that the weight of authority would indicate that a corporation contracting with the United States or the State as an independent contractor for gain cannot claim immunity from taxation by reason of its furnishing labor and service either to the United States or the State unless some statute specifically exempts such contractor from taxation in regard to the particular contract involved.

[fol. 68] The exemption of an instrumentality of one Government from taxation by another must be given such practical construction as will not unduly impair the taxing power of the taxing government.

Susquehanna Power Company v. Commission of Maryland, 283 U. S. 291.

It seems clear to me from the authorities and the facts involved here that the plaintiffs are not in a position to claim exemption from the tax imposed by reason of the fact that they are a government instrumentality.

In considering the last contention of plaintiffs, it will be helpful to inquire into the various steps leading up to the contract here involved as shown by the exhibits set forth and attached to the complaint. First a reference to the act of Congress authorizing the construction, repairs and preservation of certain public works on rivers and harbors and

for other purposes, approved August 20th, 1935, should be noted. Section 2, of that Act, being H. R. 6732, Public Act No. 409, 74th Congress, provides that: "for the purpose of controlling floods improving navigation, regulating the flow of the streams of the United States, providing for storage and for the delivery of the stored waters thereof, for the reclamation of public lands and Indian Reservations, and other beneficial uses, and for the generation of electric energy as a means of financially aiding and assisting such undertakings, the projects known as * * * and Grand Coulee Dam on the Columbia River, are hereby authorized and adopted and all contracts and agreements which have been executed in connection therewith are hereby validated and ratified, and the President, acting through such agents as he may designate, is hereby authorized to construct, operate and maintain dams, structures, canals, and incidental works necessary to such projects, and in connection therewith to make and enter into any and all necessary contracts including contracts amendatory of or supplemental to those hereby validated and ratified." This was the fed-
[fol. 69] eral authorization for the project with which we are dealing.

Exhibit 5, attached to the complaint is a copy of a resolution, the subject of which is a reconsideration of several former resolutions relative to the Grand Coulee Dam project as a project of the State of Washington and the adoption of a Resolution making said project a Federal project. This Resolution bears date March 14, 1934. It thus appears that the project was originally considered as a state and not as a federal project.

Exhibit 7 attached to the Complaint is a copy of the contract between the United States and the state of Washington acting through the Columbia Basin Commission dated November 1, 1933. This contract is entered into in pursuance of certain acts of Congress referred to as the Reclamation Laws and of the Act of June 16, 1933 (48 Stat. 125) commonly knows as the National Industrial Recovery Act. After referreing to the allotment of $63,000,000 for the construction of a dam and power plant by the Reclamation Bureau at the Grand Coulee site on the Columbia River and that the dam will provide about 5,000,000 acre feet of storage capacity, create a lake of 150 miles long and serve as a diversion dam for said project and for improvement of navigation, flood control, power development and for irriga-

tion, this contract further provides in Section 12 entitled "Title to Constructed Works" as follows: "The United States will retain the title of said dam and power plant and the operation and control thereof until the cost of said project, including the cost of the said first unit dam and power plant has been fully paid into the treasury of the United States." Section 14 of this contract grants an option to the state within a stated time to purchase the perpetual right to the entire power output of the first unit dam and the power plant by a financing scheme therein described.

From all these considerations and provisions, the questions arises as to whether or not the state is authorized to [fol. 70] cede jurisdiction, or the United States Government is authorized to accept jurisdiction over the territory involved. The record discloses that within the area occupied in the operation under plaintiffs' contract are both private, state and tribal lands. Section 8103 Remington's Revised Statutes is the general statute authorizing the state to consent to the acquisition by purchase or condemnation by the United States of any lands for the sites of locks, dams, piers and so forth, and other necessary structures required in the improvement of rivers and harbors of the state and for the sites of forts, magazines, arsenals, docks, navy yards, naval stations and other needful buildings authorized by any Act of Congress, etc., "the consent herein given being in accordance with the 17th clause of the 8th section of the first Article of the Constitution of the United States."

The Section further provides "That the jurisdiction of this state is hereby ceded to the United States over all such land as may have been or may be hereafter required by purchase or condemnation or set aside by the general government for any or either of the purposes hereinbefore mentioned." With a proviso that the state shall retain concurrent jurisdiction for the purpose of executing civil and criminal processes over such territory.

The 17th Clause of the 8th Section of Article I of the Federal Constitution authorizes Congress to exercise exclusive jurisdiction "in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the Government of the United States, *and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the*

erection of forts, magazines, arsenals, docks, navy yards, and other needful buildings."

[fol. 71] It will be noticed that the consent of the State to the acquisition of lands as mentioned in section 1808 is far more liberal in purpose than the purposes stated in the provisions of the Constitution. The Government is not authorized to exercise exclusive jurisdiction over territory other than that provided for in the Constitution and the ceding of jurisdiction by the State to other lands would be a relinquishment of State jurisdiction over territory over which the government could not acquire jurisdiction. There would thus be a territory over which Congress would have no power or jurisdiction and over which the state had relinquished jurisdiction and applying the rule Ejusdem Generia, it is certain that the purposes for which the Grand Coulee Dam area was acquired is not one of those named by the Constitutional provision.

The history of Grand Coulee Dam Project as disclosed by the records of the Columbia Basin Commission, the various resolutions of the Federal Boards hereto referred to, the contract between the Government and the State through its Commission, justifies the conclusion that the enterprise is entirely different and the purpose far removed from those cases wherein the Government acquired property for erection of forts, arsenals, postoffices, public buildings and the like, all creating structures for strictly Governmental purposes and for permanent use by the government.

This contract borne of the necessities of the economic depression and fostered by the efforts of the Government to bring relief to the unemployed by virtue of and within the spirit of the N. I. R. A. is not intended as a permanently or strictly as a Government project. Its first purpose is to relieve unemployment; its second great purpose is to irrigate vast areas of both the state, private and public lands of the United States which lands shall eventually become the property of the citizens of the state of Washington. All the purposes specifically mentioned in the Constitution are public structures of a character, the use of which would [fol. 72] either be permanent or for an indefinite period of time as distinguished from a mere incidental purpose manifestly of limited duration. The Government expressly retains title only until such time as the State repays it for

the money which is in effect loaned for the purpose of constructing and completing the project.

In Nikas v. Commonwealth, 131 S. E. 236, which was a prosecution for conducting a business without a revenue license imposed by the state, the question of exclusive jurisdiction of the United States was squarely raised. The Supreme Court of Virginia, in disposing of the question, said: "In order to accord immunity from state taxation, the accused must not only show that the land is acquired by the United States, but also that it is for one or more of the purposes so clearly indicated in Article I, Section 8, Clause 17, of the Constitution.

"It is suggested in the brief for the accused that the sole test is whether or not the land has been acquired in the manner referred to in the clause cited; that is, over 'places purchased by the consent of the Legislature of the State in which the same shall be'.

"Clearly, however, this is not the sole test, because it is manifest that the land must also be acquired for one of the specific purposes which are indicated in the clause, namely, for a fort, magizine, arsenal, dock, yard, or other needful building.

"While the land of the United States upon which the station or building is located is exempt from taxation by the state of Virginia because it is the property of the Federal Government, neither the property of others located thereon nor the business of others conducted thereon for their private gain, can be held to be so exempt. As to these others, the state statutes have full force and effect", citing a number of cases in support of these statements.

That it was not the intention of the parties that the Federal Government should have exclusive jurisdiction over [fol. 73] the ceded area is evidenced by a number of the provisions of the specifications of this contract. Section 35 of the specifications referring to the camp site provides, among other things, that: "Regardless of the approval of the contracting officers, the contractor shall comply with all the laws and regulations of the State of Washington or any agency or subdivision thereof which affect the building, maintenance or operation of the contractor's camp."

Section 38 of the specifications regarding sewers and sanitation provides that the collection of garbage and refuse shall be such as approved by the contracting officer or by the proper state or local regulatory authority.

Section 42 requires that the contractor shall make all necessary arrangements with the proper state and county authorities for school facilities. All these provisions have been carried out and provided for by the contractor in accordance with the specifications.

From these considerations, it seems clear to me that the territory in which plaintiffs are operating is not within the exclusive jurisdiction of the Federal Government and, from my examination of the authorities as applied to the facts in this case, I am convinced that the contentions of the plaintiffs, either as to jurisdiction or as to their being a Federal instrumentality exempt from the tax cannot be sustained.

Judgment may be entered in favor of the defendants.

John M. Wilson, Judge.

[File endorsement omitted.]

[fol. 74] IN SUPERIOR COURT OF THURSTON COUNTY

No. 15850

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, Co-partners as Atkinson-Kier Company, Plaintiffs,

v.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, Thomas S. Hedtes and T. M. Jenner, Constituting the Tax Commission of the State of Washington, Defendants

JUDGMENT—Filed December 2, 1935

This cause was heretofore submitted upon the issues made by the pleadings herein and evidence having been introduced by the parties and the cause submitted,

It is Now Considered, Ordered and Adjudged that the plaintiffs have not made out a case entitling them to any relief against the defendants, and that this suit be and it is hereby dismissed. Defendants will recover their costs.

Dated this 2d day of December, 1935.

John M. Wilson, Judge.

[File endorsement omitted.]

[fol. 75] IN SUPREME COURT OF WASHINGTON

En Banc. No. 26059

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, Co-partners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company, Appellants,

vs.

THE STATE TAX COMMISSION et al., Respondents

OPINION—Filed October 28, 1936

The question in this case is the power of the state of Washington to exact its occupation tax from the appellants in respect of the compensation received by them from the federal government for the construction of the Grand Coulee dam and power plant. The case is here on appeal from a judgment of the superior court denying injunctive relief against threatened proceedings by the respondents, members of the state tax commission, to enforce collection of the tax.

By contract, made September 17, 1934, with the United States, acting through the bureau of reclamation, the appellants, other than the Mason-Walsh-Atkinson-Kier Company, for a lump sum of approximately twenty-nine million dollars, engaged to construct the dam and power plant in accordance with plans and specifications therefor embodied in the contract by reference. The contract was awarded to the appellants upon competitive bids and after public notice of a call for tenders. The appellant Mason-Walsh-Atkinson-Kier Company was not a party to the contract but was formed by the contractors to have immediate charge of the [fol. 76] work as their agent and representative in fulfilling the contract.

The appellants, both corporate and individual, are non-residents of the state, and their sole business in the state is the prosecution of the work required by their contract.

As necessarily incidental to the prosecution of the contract, they conduct stores, mess-houses, and other commercial activities at the dam site for the convenience of the great number of employees engaged and their families, as well as all others of the public who have occasion to visit

the works. As to these collateral activities, they are conforming to the state laws and paying such license, sales, and other taxes as are required by the state.

The challenged occupation tax is sought to be assessed against the appellants pursuant to chapter 191, Laws of 1933, p. 869 et seq., as amended by chapter 57, Laws of 1933, Ex. Sess., p. 157, et seq., providing:

"From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business not specifically taxable under section 2 of this act, an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *." Laws of 1933, Ex. Sess., p. 157, sec. 1.

It was held in Rainier National Park Co. v. Henneford, 182 Wash. 159, 45 P. (2d) 617, that while the tax imposed by chapter 191 is an excise and not a property tax, it is in no sense a license tax and is not imposed as a prerequisite to entering into, or for the regulation of, business, but solely for revenue purposes.

The appellants contend that they are engaged in the work required by their contract as an instrumentality of the government of the United States and, as such, are immune from [fol. 77] the occupation tax. The appellants also contend that their operations are conducted in territory exclusively occupied by the federal government under cession of jurisdiction by the state, and that, by reason of this fact, the state laws are inoperative upon them. While reserving this second objection to the tax, the point is not argued in the appellants' briefs. However, the question is urged in a companion case and disposed of adversely to the appellants' contention. Ryan v. State, — Wash. Dec. —.

It is unnecessary to set out in any detail the provisions of the contract and specifications. It is enough to say, insofar as the fact is material, that while, under its terms, the federal government reserves a large measure of supervisory control for the purpose of insuring proper standards of

material and workmanship and a compliance with the policy of the government in respect of the conditions of labor, the appellants are independent contractors.

The principle upon which the immunity of federal instrumentalities and agencies from state taxation rests is stated in Railroad Co. v. Peniston, 85 U. S. (18 Wall.) 5, where, after referring to the rule often declared by that court that the taxing power of the state is one of its attributes of sovereignty, indispensable to its continued existence and not dependent upon the constitution of the United States or derived from that instrument, it is said:

"There are, we admit, certain subjects of taxation which are withdrawn from the power of the states, not by any direct or express provision of the federal constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National government is legitimately exercised within the states. While it is true *that* government cannot exercise its power of taxation so as to destroy the state governments, or embarrass their lawful action, it is equally true that the states may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the national government."

In Metcalf & Eddy v. Mitchell, 269 U. S. 514, it is said [fol. 78] that just what instrumentalities of either a state or the federal government are exempt from taxation by the other, cannot be stated in terms of uniform application. Admittedly, those instrumentalities through which either government immediately and directly exercises its sovereign powers are immune from taxation by the other, and the court refers to illustrative instances in which the claim of immunity was upheld because the instrumentalities taxed were all so intimately connected with the necessary functions of government as to fall within the established exemption.

"When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of

the rule. Thomson v. Pacific Railroad, 9 Wall. 579; Railroad Co. v. Peniston, 18 Wall. 5; Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375; Gromer v. Standard Dredging Co., 224 U. S. 362, 371: Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319; Choctaw, O. & G. R. R. Co. v. Mackay, 256 U. S. 531.

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. McCulloch v. Maryland (4 Wheat. 316), supra; Collector v. Day (11 Wall. 113), supra; Dobbins v. Commissioners of Erie County (16 Pet. 435), supra.

* * *

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its power. Hence the limitation upon the taxing powers of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (South Carolina v. United States, 199 U. S. 437, 461; Flint v. Stone Tracy Co., supra (220 U. S. 107), at 172), or the appropriate exercise of the functions of the government affected by it. Railroad Co. v. Peniston, supra, 31." Met-
[fol. 79] calf & Eddy v. Mitchell, supra."

In that case, consulting engineers had been employed to advise states or their subdivisions with reference to proposed water supply and sewage disposal systems. They claimed exemption from the Federal income tax upon the portion of their net income earned through this public employment. Adverting to the principle that any taxation

by one government of the salary of an officer or the public securities or any agency created and controlled by the other, is prohibited, the court continues:

"But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way."

In Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375, where it was held that a state might tax the interest of a corporation in a dry dock which the United States had the right to use under a contract with the corporation, the court said:

"It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319, a state tax on premiums collected by bonding insurance companies on surety bonds required of United States officials was held valid. It is said: "But mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control."

General Construction Co. v. Fisher, 149 Ore. 84, 39 P. (2d) 358, 97 A. L. R. 1252, decided in December, 1934, is a case similar in its features to the present one. There, as [fol. 80] here, a foreign corporation, qualified to do business in the state of Oregon, entered into a contract with the Federal government to furnish labor and material for the construction of the Owyhee dam and irrigation works in

connection with the Owyhee irrigation project in Eastern Oregon. The work was done through the department of the interior, and the only net income received by the contractor from its operations in Oregon for the period involved was derived from the contracts with the United States government. The Oregon state tax commission exacted, from the plaintiff, large sums levied upon its income from its operations during several years. The taxes were paid under protest and to prevent levy being made on certain machinery and equipment necessarily used by the contractor in performing its contract with the United States government. Suit was brought to recover the amount of taxes so paid, the complaint alleging, as one of the grounds of attack upon the tax, that it was an unwarranted burden upon the functions of the Federal government. The trial court sustained a demurrer to the complaint, and a judgment was entered dismissing the action. On appeal to the supreme court of Oregon, the judgment of the trial court was affirmed.

The court held that when the construction company, as an independent contractor, entered into a contract to perform labor for, and furnish material to, the Federal government, it did not thereby become a part, or an instrumentality, of the United States, and its property, and its rights to conduct business within the state were not immune from taxation by the state wherein it was located in performing its contract, citing Thompson v. Union Pacific Ry. Co., 76 U. S. (9 Wall.) 579, 19 L. Ed. 792; Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375, 25 S. Ct. 50; Metcalf & Eddy v. Mitchell, 259 U. S. 514, 46 S. Ct. 172; Gromer v. Standard Dredging Co., 224 U. S. 362, 32 S. Ct. 499. Continuing:

[fol. 81] "• • • the property of plaintiff within the state of Oregon was subject to taxation by the state even though used in performing a contract with the federal government. The property thus being taxable, the privilege of using it for such purposes, based on the net income derived from its use is also taxable, whether called a property tax, a privilege tax, or an income tax. In the final analysis it all amounts to the same thing. It was the property of plaintiff that plaintiff alleges was to be taken for the tax.

"The principle of immunity from state or local taxation of the property and instrumentalities of the United States

is generally based upon the direct ownership, or use and control of the property by the United States. Such immunity does not extend to the property of an independent contractor for gain even should it be used in carrying out a contract with the United States. The same principle obtains regarding taxation by the United States of incomes derived by persons and corporations from the state: Metcalf v. Mitchell, supra."

Commenting on the contention made that the imposition of a tax tended to hamper and delay the Federal government in carrying out its contracts, the court said:

"Every tax levied has some remote tendency to interfere with the contractual relations between parties, but that is no reason why such parties should not contribute their just proportion to the expenses of maintaining the government from which they demand protection for their property and privileges. In the instant case the work performed by plaintiff was undoubtedly let to the lowest responsible bidder. We cannot see how the tax complained of in any way impaired said contract, or hindered the federal government in its governmental functions."

An appeal from the decision in that case to the supreme court of the United States was dismissed (Gen. Const. Co. v. Fisher, 295 U. S. 715, 55 S. Ct. 646) upon the authority of Trinityfarm Const. Co. v. Grosjean, 291 U. S. 466, 54 S. Ct. 469; Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172; Lucas v. Howard, 280 U. S. 526, 50 S. Ct. 87; Lucas v. Reed, 281 U. S. 699, 50 S. Ct. 352; Alward v. Johnson, 282 U. S. 509, 514, 51 S. Ct. 273; Fillcuts v. Bunn, 282 U. S. 216, 224, et seq., 51 S. Ct. 125; and Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375, 382, 25 S. Ct. 50.

In Six Cos. v. DeVinney, 2 F. Supp. 693, the plaintiff, contractor on Boulder dam and power plant, sought to enjoin the collection of taxes levied by the state of Nevada upon its personal property and poll taxes alleged to be due from [fol. 82] its employees, claiming to be an instrumentality of the United States and, as such, not subject to the revenue laws of the state. Holding against the plaintiff's contention, Norcross, district judge, said:

"The case of a corporation contractor for the construction of public works is one in which, if it may be said to be

an instrumentality of the government, its relations to the government are nevertheless purely contractural. It does not exercise governmental functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying. In the case of Clallam County v. United States, 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328, the court held that 'the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war,' and said: 'This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account.' ''

In the case before us, while it is a fact that the appellants are, for the time, performing no work within the state other than that covered by their contract with the Federal government, they are in no sense creatures of the government, nor brought in by the government especially for the work. The parties to the contract are general contractors engaged in contracting throughout the United States, and the two corporate contractors have qualified themselves to do business in the state of Washington.

In State v. Wiles, 116 Wash. 387, 199 Pac. 749, Wiles had entered into a written contract with the United States government whereby he agreed to carry the United States mail in the city of Seattle between the various depots, wharves, docks, postoffice, and substations, and for the purposes of the contract, he used motor trucks. He was required to provide vehicles for the carriage of the mail and to keep them properly equipped and repaired. Under the contract, the trucks were to be used only in the business of carrying the United States mail. Refusing to obtain a license authorizing the operation of his trucks, he was convicted of operating trucks upon the highways of King County without a license, as required by the state laws. On his appeal [fol. 83] to this court, the appellant contended that he was an instrumentality selected by the government in the performance of its governmental functions and, as such, was immune from the obligation to obtain any pay for a license; that since he was doing for the government what it might do for itself, to impose a tax upon him would be in effect to impose it upon the government, because any private per-

son carrying mail would necessarily require the government to pay him an additional amount equal to the tax. Commenting on this contention and the authorities urged in support of it, the court said:

"Here there is no effort to tax the business of carrying the mail. The appellant is not a direct instrumentality of the government; he is a personal contractor, doing certain work for the government, at a fixed compensation. In no sense is he the representative or agent of the government nor an integral part of it * * *.

"A person building a state road is nothing but a contractor; he is no part of the state or its agencies, and does not thereby inherit the various immunities of the state. There is nothing in appellant's contract which indicates that the government intended to pass its immunities on to him. Under these circumstances it should be presumed that it was the intention that he should be subject to the general laws of the state."

Deducing the rule from the authorities cited, we said:

"While it is true, generally speaking, that a state may not by its laws hamper and interfere with the free and orderly performance of governmental functions, by taxation or otherwise, yet that interference must be substantial and direct. Every indirect and immaterial interference with the conduct of government business is not violative of the principles upon which the Federal government is founded and performs its duties. The rule of reason must control in all such questions, otherwise the states will be greatly hampered in the conduct of their affairs, without any correspondent benefit flowing to the national government."

The appellants cited Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U. S. 218, 48 S. Ct. 451, 56 A. L. R. 583, and Graves v. Texas Co., 56 S. Ct. 818. These cases involve a tax on the sale of gasoline to the United States and are alike in principle. In the latter case, the state of Alabama levied an excise tax of six cents a gallon upon storers of gasoline, accruing at the time of withdrawal from storage. This was challenged by corporations storing and selling to the United States large quantities of gasoline required by it for its governmental uses, and delivered pur-

[fol. 84] suant to written contract. There was some contention that the law was one taxing mere storage and not sale, and, as such, was properly taxable by the state. The court was of the opinion that storing alone was not intended to be taxes, but, assuming that by the acts under consideration, the state meant to tax mere storing, the court held that that purpose could not be given effect in respect of the company's sales and deliveries to the United States, without infringing the constitutional principle which safeguarded the Federal government against state taxes.

"Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so essential to the sale of the gas-line to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat 'a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing.' Brown v. Maryland, 21 Wheat. 419, 444, 6 L. Ed. 678: As held in the Panhandle case (277 U. S. 218, at page 222), (48 S. Ct. 451, 452, 72 L. Ed. 857, 56 A. L. R. 583): 'A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons.' So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawing so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional."

In our opinion, there is a vital distinction between the Graves and the Panhandle Oil Co. cases and the present case. There, the tax of so many cents per gallon was exacted upon every gallon that left the storage for delivery to the United States. The tax was on the sale to the government and was direct and immediate. Here, the occupation tax is but one of numerous incidental expenses neces-

sarily inhering in the qualification of the contractors to perform the work for the government.

The case of Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466, involved a tax of five cents per gallon levied upon gasoline by the state of Louisiana. A contractor with [fol. 85] the Federal government for the construction of levees in Louisiana, to control the waters of the Mississippi river, challenged the right of that state to exact the gallonage tax on gasoline purchased and used by the contractor in performing its contract with the Federal government. In upholding the tax, the court said:

"The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi river, and to authorize the performance of the work directly by government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor. The exaction in respect to its relation to the Federal undertaking is wholly unlike those considered in Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292; Indian Oil Co. v. Oklahoma, 240 U. S. 522; and Gillespie v. Oklahoma, 257 U. S. 501. Appellant is an independent contractor. Casement v. Brown, 148 U. S. 615, 622. It is not a government instrumentality. Cf. Metcalf & Eddy v. Mitchell, 269 U. S. 514. Group No. 1 Oil Corp. v. Bass, 283 U. S. 279. Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. Thomas v. Gay, 169 U. S. 264, 275. Metcalf & Eddy

v. Mitchell, supra, 524 et seq. Wheeler Lumber Co. v. United States, 281 U. S. 572, 579. Appellant's claim of immunity is without foundation."

This case, contrasted with Graves v. Texas Co., and the Panhandle Oil Co. case, illustrates, we think, the distinction in principle involved. In the Graves case, the tax was laid upon the direct sale to the government. In the Trinity farm Construction Co. case, a like tax was paid by the contractor, but the sale was not made directly, or in effect, to the Federal government. It was argued that the tax inhered in the cost of the work performed by the contractor, and, therefore, affected the governmental operations as effectively as if the gasoline had been actually sold to the government. But the court brushed this contention aside by saying that the tax was not laid upon the choice of means, the making of the contracts, the contracts themselves, or any trans- [fol. 86] action to which the Federal government was a party or in which it was immediately or directly concerned.

And so, in the present case, the means chosen by the government for building the dam and power plant was by contract, rather than the doing of the work directly by its own officers or agencies.

In Weston v. City Council of Charleston, II Peters 449, the city of Charleston had levied a tax on "six and seven per cent. stock of the United States." In holding the tax void as an unauthorized imposition upon an instrumentality of the Federal government, Chief Justice Marshall used this language:

"It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

"The distinction is, we think, apparent. When lands are sold, no *connexion* remains between the purchase and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it

may then assume is not questioned. The *connexion* between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government stands, we think, on very different principles from a tax on lands which the government has sold. * * *

"The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

We have here an early recognition of the distinction we are making between the cases of Graves v. Texas Co., supra, and Trinityfarm Construction Co. v. Grosjean, supra. The tax was on the contract to repay money borrowed. After the borrowed money was repaid to the lender, the government was no longer concerned or affected. Here, the government, by its contract, agreed to pay the contractors a lump sum for the rendition of specified services. When the money is earned and paid to the contractor and becomes a part of his gross [fol. 87] earnings, the Federal government is no longer concerned with what he may be required to pay as a tax upon the privilege of doing business in this state, no more so than it was concerned in the amount of the tax paid upon gasoline, by the contractor, in building the Mississippi river levees.

In Railroad Co. v. Peniston, 85 U. S. 5, supra, the Union Pacific Railway, a corporation chartered by Congress, sought, by reason of the source of its incorporation and certain services agreed to be rendered to the government of the United States, to avoid taxes levied upon its property by one of the counties of the state of Nebraska. The court, in upholding the tax, pointed out that, as it was levied on the property of the railroad only, it did not affect its capacity to render whatever governmental services it owed the government. In a dissenting opinion, Justice Bradley, after contending that the rule established in McCulloch v. Maryland, 4 Wheat. 316, and other cases following it, should be applied, makes this significant concession to the prevailing opinion.

"The case differs *toto coelo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the

functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interferred with. In that case the contract is the means employed for carrying into execution the powers of the government, and the contract alone, and not the contractor, is exempt from taxation or other interference by the State government."

Our conclusion is that the trial court correctly held appellants liable for payment of the challenged tax, and its [fol. 88] judgment denying injunctive relief is, accordingly, affirmed.

Geraghty, J.

We concur: Millard, C. J. Main, J. Mitchell, J. Tolman, J. Holcomb, J. Beals, J. Blake, J. Steinert, J.

[fol. 89] [File endorsement omitted]

Copy received January 15th, 1937. E. P. Donnelly, Attorneys for Appellees.

[fol. 90] In Supreme Court of the United States

[Title omitted]

Appellants' Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed January 15, 1937

Petition for Appeal

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Washington in the above entitled cause, the plaintiffs Silas Mason Company, Inc., Walsh Construction Company, Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, coparners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company pray that an appeal therefrom to the Su-

preme Court of the United States be allowed and that an order fixing the amount of bond be made.

[fol. 91] ASSIGNMENT OF ERRORS

Appellants assign the following errors in the record and proceedings in the said case. That the statute of the state of Washington imposing an occupation tax is unconstitutional and void as applied to the particular transactions stated in the complaint of appellants in this:

1. That the challenged tax is levied directly upon the consideration paid by the United States to the appellants for the performance of a contract by means of which the United States Government is carrying on a governmental enterprise. The Supreme Court of the State of Washington erred in holding such a tax to be a valid exercise of the taxing power of the State, and erred in confirming the judgment of the Superior Court of the State of Washington, for Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

2. That the contract between the United States Government and appellants upon which the challenged tax is levied is being performed upon land acquired by the United States for the purpose. Exclusive jurisdiction over this land has been ceded by the State of Washington to the United States. The Supreme Court of the State of Washington erred in holding that the State of Washington has power to tax the occupation carried on by appellants in that territory, and erred in affirming the judgment of the Superior Court of the State of Washington, for Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

PRAYER FOR REVERSAL

For which errors appellants pray that the said judgment [fols. 92-135] of the Supreme Court of the State of Washington, dated October 28, 1936, be reversed and judgment rendered in favor of appellants and for costs.

B. H. Kizer, Arnold L. Graves, Counsel for Appellants. Graves, Kizer & Graves, of Counsel for Appellants.

[fol. 136] [File endorsement omitted]

Copy received January 14th, 1937. E. P. Donnelly, Attorneys for Appellees.

[fol. 137] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 15, 1937

The appellants in the above entitled suit, and each of them, having prayed for the allowance of an appeal of this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Washington on the 28th day of October, 1936, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is Now Here Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Washington in the [fol. 138] above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Washington shall prepare and certify a transcript of the record and proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within sixty days from the date of this order.

It is further ordered that security for costs on appeal, together with security for the payment of all the taxes involved in said suit, be fixed in the sum of $5,000.

Dated this 15th day of January, 1937.

Wm. J. Steinert, Chief Justice of the Supreme Court of Washington.

[fols. 139-141] Citation, in usual form, showing service on E. P. Donnelly, filed January 15, 1937, omitted in printing.

[fols. 142-145] Bond on appeal for $5,000.00, approved and filed January 15, 1937, omitted in printing.

[fol. 146] [File endorsement omitted]

Received Feb. 4, 1937. Attorney General's Office, Olympia.

[fol. 146a] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed February 4, 1937

To the Honorable Benjamin T. Hart, Clerk of the Supreme Court of the State of Washington:

It is Stipulated that you shall prepare and transmit to the Supreme Court of the United States under your hand and the seal of the Supreme Court of the State of Washington in the manner and in the time required by the statutes of the United States, rules of the Supreme Court of the United States and the order allowing the appeal herein, a true copy of the material parts of the record herein, including the following:

1. Amended complaint with all exhibits thereto.
2. Answer to amended complaint.
3. Reply.
4. Memorandum opinion Judge of Superior Court for Thurston County.
5. Judgment of dismissal.
6. Opinion of the Supreme Court of Washington, filed October 28, 1936.

[fol. 147] 7. Petition for allowance of appeal to the Supreme Court of the United States, Assignment of Errors, and Prayer for Reversal.

8. Statement as to Jurisdiction.
9. Notice of filing Statement as to Jurisdiction and proof of service thereof.
10. Order allowing appeal.
11. Citation on appeal.
12. Bond on appeal.
13. Præcipe for record on appeal.
14. That part of the statement of facts, commencing at line 9, page 4, thereof, to and including page 60 thereof.

It is Further Stipulated that you shall transmit to the Clerk of the Supreme Court of the United States all of the original exhibits on file in this cause.

It is Further Stipulated that any additional matters of record may be supplied by either party hereto that are deemed necessary, and that counsel may further stipulate in open court as to any other matters as to which information may be asked by the court.

B. H. Kizer, Arnold L. Graves, Counsel for Appellants. E. P. Donnelly, Counsel for Appellees.

[fol. 148] IN SUPERIOR COURT OF THURSTON COUNTY

Excerpt from Statement of Facts

COLLOQUY

Mr. Weller: There are involved upon this hearing before Your Honor three cases. These cases all involve the right of the state of Washington to levy and collect an occupation tax on business transacted at the Grand Coulee Dam within the area there that has been acquired by the Government.

The issues of law involved are practically all the same, and it will be, in the main, a law argument. There are a few facts different, possibly, in the different cases and, for that reason, it has been agreed by counsel that the record will be kept separate in each case and then I think that the law arguments will be made all together.

Now, the first case arose out of the following transactions—

The Court: That is which one?

Mr. Weller: That is the Ryan case against the State.

The Court: What number?

Mr. Weller: I never have had the number in my file.

The Court: It is number 15668, that seems to be the first number filed.

Mr. Donnelly: Yes, Your Honor, that is right.

Mr. Weller: The next one is 16294.

On November 20th, 1933, the Department of the Interior of the United States Government opened bids at Spokane for certain work involving the excavation of over-burden at the dam site and Mr. Ryan was the successful bidder. Now, has Your Honor ever visited this project?

The Court: Not since they started the project, but I have been through that section of the country.

Mr. Weller: Well, just a few words of explanation:

As you travel along the Columbia River, it comes in at the northeast corner of the state, then runs southwest for a ways, then almost directly west, and turns north for a short [fol. 149] distance, and this dam site is about half a mile north of the bend in the river. The river is running almost directly north at the dam.

This first contract which was let, the first bit of business by the United States Government toward the actual construction work on the dam, consisted of removing the dirt at either end. That is, on the east and the west side of the river, for the construction work. It involved the removal of about one million yards on each side of the river and, as I say, this contract was let to Mr. Ryan. And the construction work, the actual excavation work, started a few days before the first of the year. The contract was actually signed and approved by the Government about December 30th. The work started a few days before that.

Now, I think possibly, in order that Your Honor may understand, it might be well to briefly state these steps in their order. I am not attempting, Mr. Graves, to interfere or go into your case, but just stating the fact.

In the next, the following summer, about July, as I recall, the bids were opened for the construction of the first part of the dam, that is the lower part of the dam and Mr. Graves' client, the Mason-Walsh-Atkinson and Kier Company were the successful bidders and their case arises out of the occupation tax involved in that project.

Shortly after that, about in August, the Government—1903—the Government let the contract for the construction of a railroad, a construction railroad is what it is termed in the contract, running from the Northern Pacific stub line generally known as the Central Washington line at Odair to the dam site. This railroad, the contract was let to Mr. Ryan, and this railroad was for the purpose of serving the construction of the dam and undoubtedly any necessary purpose after the dam is constructed, but is called a construction railroad. So there are the three contracts out of which the taxes are sought to be imposed by the Tax Commission of the State of Washington.

[fol. 150] In the first case, the excavation case, Mr. Ryan paid the first assessment that was levied upon him, petitioned the Tax Commission for a refund of the amount and,

upon their denial of the petition, brought suit to recover back.

The other two cases are injunction suits to prevent the Tax Commission from levying or attempting to collect the tax.

Now, I think that, apparently, is a sufficient statement of the surrounding circumstances so the Court will understand what we are getting at. There are probably no disputed facts in this case. We have talked this matter over with Mr. Donnelly several times and, while we have not stipulated in writing as yet, I believe that we will be able to stipulate every necessary fact. And I will say to the Court, on behalf of our client, that if there should be any question regarding any fact that is not brought out that Your Honor believes to be necessary for your decision in this case and we can supply such facts, we will gladly do so.

As far as we are concerned, our cards are on the table. We have nothing to conceal in any way, and I am satisfied that the office of the Attorney General is likewise in that same frame of mind. Now, shall we proceed with the Ryan case?

Mr. Graves: So far as I am concerned, yes, Mr. Weller. It might be desirable to say that these cases are not consolidated, but simply tried together for convenience and the record in each case will be kept separately.

The Court: That is my understanding.

Stipulations as to Facts

Mr. Weller: Now, in the case of Ryan versus the State of Washington, number 15667, I will make the following statement of stipulation as to facts and if there should be any controversy on any of those matters, why, Mr. Donnelly can interrupt at any time.

It is stipulated in open court between the attorneys for plaintiffs and attorneys for the State of Washington that the facts in this case are as follows:

[fol. 151] That Mr. Ryan, the plaintiff, is and was at all times during the time he was engaged on this contract, a citizen of the state of California and his domicile was there, his legal residence. He was actually in the state of Washington during the performance of the contract, but his legal residence was in California at all those times.

Mr. Donnelly: In an instance like that there might be an additional fact that I would like to put in. Should we do it now as we go along? For instance, in regard to the fact that he maintained his office at Spokane, or shall I state that later?

Mr. Weller: In view of the fact that the law did not go into effect until January 1st and he was actually down there before that time, I don't think that would be material in this case. He was on the ground at all times while this law was in effect.

Mr. Donnelly: It might be material in view of the position we take in the first case.

The Court: Well, I suggest, Mr. Donnelly, that you permit counsel to state his facts covered in the stipulation, and if you have any additional facts or you desire to change it in any way, you can take it up afterwards. You can make a note of it as you go along and it will save confusion.

Mr. Weller: I will state, Your Honor, for the purposes of the record, what I do not consider a necessary fact, that prior to the commencement of actual work under this contract, Mr. Ryan had his office in the Davenport Hotel at Spokane, Washington; that he, while there, entered into certain sub-contracts with sub-contractors who actually did the work; that he removed his office to the dam site where it was upon land acquired by the Government and that is and will be actually used by the Government in this project, where his office remained during the entire construction work, or excavation work by him, he having moved his office down there about the middle of December, 1933.

[fol. 152] That the contract with the Department of the Interior was actually entered into by Mr. Ryan about December 30th, 1933. That the title to all of the land upon which all of the work was performed by the plaintiff under said contract had been acquired by the United States Government by purchase prior to the commencement of said work by plaintiff or was being acquired by the United States Government by condemnation thereof in the District Court of the United States for the Eastern District of Washington at Spokane, Washington, for a site for the dam across the Columbia River, together with keepers' dwellings, power houses, and other structures and buildings of all kinds necessary for flood control, improvement of navigation, development of electrical energy, and irrigation.

That all of the land on said project upon which the work of the plaintiff was done and performed was above high water mark of the Columbia River and was necessary for and will actually be used by the United States Government in the construction of said project; and that the work performed by plaintiff under said contract with the United States Government was a necessary part of the construction of said project. That during the period of performance of said contract and the receipt of income therefrom by plaintiff, his sole and principle place of business in the state of Washington was located entirely upon and within the confines of the land so acquired and held by the United States, with the exception that he had his office in Spokane until about the middle of December, 1933.

That plaintiff sold merchandise, consisting generally of gasoline, oil, greases, tires, automobile parts and accessories, the income therefrom being included in and part of the assessment referred to in the notice of appeal and that all of said merchandise was stored, sold, and payment received by plaintiff entirely upon and within the confines of the land so acquired and held by the United States, such sales being made by plaintiff in connection with, but not as a part [fol. 153] of, his contract with the United States.

That the sole business, occupation and source of income of the plaintiff within the state of Washington since January 1st, 1934, until the completion of said contract, has been from and in connection with the performance of this contract with the United States Government, and the sale of merchandise herein used and referred to.

That plaintiff sub-let to others the performance of all the work provided to be done under said contract, on June 4th, 1934, the Tax Commission of the state of Washington issued its order number 1001 assessing plaintiff in the sum of $4,012.25 as the amount alleged to be due from him to the state of Washington on account of the occupation tax and penalty and that on June 11th, 1934, plaintiff paid said amount to the state of Washington; That within twenty days after date of the notice of said assessment, plaintiff filed a petition in writing with the Tax Commission of the state of Washington for hearing upon the order of assessment asking for a refund of the amount paid by him; and that after the hearing, towit, on August 9th, 1934, the Tax Commission entered its order denying plaintiff's petition for a refund; and thereupon this appeal was taken from

that order in accordance with the statute. Now, Mr. Donnelly, do you have some suggestions or changes that you wish to make?

Mr. Donnelly: Yes, Your Honor, in that connection some of the facts which I will want to stipulate, most of them indeed, will go to all three cases, and Mr. Graves has had prepared a map which will dispose of a lot of stipulated facts.

Now, how do you suggest that it will be possible to have the facts stipulated in another case considered in this case?

Mr. Graves: Well, you can just mention at the time the [fol. 154] evidence is to be introduced that it is to be used in this case; and if we want to, later on, refer to it, we will adopt that by reference. The reporter can just incorporate the particular piece of evidence in both cases in the record in each of the case-. For instance, if you want to use this map now, in this case, why you can use it in this case and we will agree, when it comes to the trial of our case, that it is also to be considered in our case.

The Court: I think that will be very satisfactory.

Mr. Graves: That is just to keep the record straight.

Mr. Donnelly: The defendant State of Washington assumes that the contract and specifications will be introduced in evidence and there will be no objection to that.

Mr. Weller: They will be. The stipulation as read, then, is agreeable to the State, is it, Mr. Donnelly?

Mr. Donnelly: With one exception that I will no- mention. The stipulation doesn't refer to the identical contract and the stipulation number 3, or paragraph 3, counsel stipulared that the work was done upon property acquired or being acquired by the United States by condemnation in the District Court of the United States for the Eastern District of Washington at Spokane, where the site of the dam crosses the Columbia River, togeher with keepers' dwellings, power houses and other structures and buildings of all kinds necessary for flood control, improvement of navigation, development of electrical energy and irrigation.

Now, Mr. Weller, there seems to be some conclusions in there, and I understand you have a certified copy of an actual petition which will be introduced in evidence.

Mr. Weller: Yes.

Mr. Donnelly: May we not stipulate, rather than have this conclusion, that the condemnation proceedings them-

selves may be agreed to be typical of all condemnation proceedings over there?

Mr. Weller: We will so stipulate.

[fol. 155] Mr. Donnelly: An argument may turn on some of these keepers' dwellings, railroads and so forth, and we will stipulate to the fact and they will be introduced in evidence as to the condemnation.

Then, with reference to the residence. The contract was performed by Mr. Ryan through sub-letting, sub-letting in two parts, one to M. S. Ross and one to Goodfellow Brothers. Both of those contracts were made at the office of Mr. Ryan in the Davenport Hotel in Spokane.

Mr. Weller: Yes.

Mr. Donnelly: And prior to his going to the dam area for the performance.

Mr. Weller: Those two contracts were both executed prior to the 15th of December, 1933, and while Mr. Ryan still maintained his office at the Davenport Hotel in Spokane.

Mr. Donnelly: That after the starting of the work by the said contractors, Mr. Ryan maintained a staff to supervise that work.

Mr. Weller: That is correct.

Mr. Donnelly: At the area; that in accordance with the provisions of the contract he reported the payroll to the Department of Labor and Industries of his employees.

Mr. Weller: That is correct.

Mr. Donnelly: And that he also reported his payroll in connection with his business of selling gasoline and incidentals, personal property.

Mr. Weller: That is true.

Mr. Donnelly: That the tax, the amount of the tax you mentioned, covers the occupational tax on both phases, that is, the performance of the contract and——

Mr. Weller: I had that in my stipulation.

Mr. Donnelly: And on the business of selling.

Mr. Weller: Yes.

Mr. Donnelly: I think then, that the defendant will stipu-[fol. 156] late to the stipulation as read by counsel with the corrections that I have made, or additions.

Now, in addition to that, if the court please, the defendant wishes to show or wishes to have stipulated with the consent of counsel that the actual performance of the work by the sub-contractors was upon property that had been

acquired, I think, actually by a condemnation, or was it by purchase?

Mr. Weller: By both.

Mr. Donnelly: By purchase and condemnation from private parties. That the work was above the high water mark of the Columbia River. That is, now, with sole reference to Ryan's first contract, being the removal of the overburden on both sides of the river.

Mr. Weller: Yes.

Mr. Donnelly: And that the facts stipulated in the MWAK case, they may be stipulated in your case.

Mr. Weller: I think probably that would be the better way.

Mr. Donnelly: I may say to the Court that later in the stipulation the nature of the contract and the actual conditions will appear and such portions as we wish to be considered in the one case will be referred to. That will be with reference to the first contract.

Mr. Weller: Yes.

Mr. Donnelly: With the exception of such facts as we will stipulate later.

Mr. Weller: It probably will appear, if the Court please, that there may be additional facts as the case develops, that it will be necessary to stipulate into the record, but I think there will be no dispute among counsel as to the facts. I have a little documentary evidence that I desire to introduce. First, plaintiff's identification A in cause 15668. Plaintiff's exhibit A is a copy of the contract and specifications and bond between Mr. Ryan and the Government in this case.

[fol. 157] Mr. Donnelly: I have no objection to that.

The Court: It may be admitted.

(Copy of contract and specifications and bond between plaintiff Ryan and the Government marked plaintiff's A in cause 15668.)

Mr. Weller: Plaintiff's exhibit B is a certified copy from the Federal Court at Spokane, Washington, of a complaint and a declaration of taking and an order of taking in one of the condemnation suits of the land involved in this controversy. It is an order of possession instead of an order of taking.

Mr. Donnelly: We will stipulate that is typical of the procedure brought by the Government.

Mr. Weller: I will say to the Court there were a number of such condemnation suits and that the form of all the papers as certified there were the same in all cases. The same general form was follows.

The Court: It may be admitted.

(Certified copy from Federal Court in Spokane of the complaint and order of possession admitted and marked plaintiff's Exhibit B in cause 15668.)

Mr. Graves: Mr. Reporter, please make a note there that the plaintiff in cause 15850, Silas Mason Company versus Tax Commission will desire to have that exhibit incorporated in the record in their case. That was the last only *only*, the condemnation proceedings. I don't care anything about the contract with Ryan.

Mr. Donnelly: It may be stipulated that that is typical of the condemnation proceedings through the whole project.

Mr. Graves: Yes.

Mr. Weller: I think probably I should offer to read into the record the act of Congress relating to rivers and harbors. It might not be accessible to the Court.

Mr. Graves: Well, just pass it up to the Court for his use. That will be all that is necessary.

[fol. 158] Mr. Weller: This is a copy of the Act relating to the approval of the dam site.

The Court: I presume it is for the Court's convenience in connection with your brief?

Mr. Weller: Yes, Your Honor. Now, I think that is our case in chief, Mr. Donnelly, and we rest.

Mr. Donnelly: With the exception of such facts as we may wish to incorporate in this case in subsequent stipulations, the State will rest.

Mr. Weller: Do you want to take you- case up now, Mr. Graves?

Mr. Graves: Well, let us get the evidence in and then argue it all together.

Mr. Weller: Well, I mean the evidence.

Mr. Graves: I will have some evidence on our part of the case.

Mr. Weller: Probably I had better go ahead with the railroad case.

[fol. 159] Mr. Weller: This evidence now will be introduced in the case of Ryan versus the Tax Commission num-

ber 16294. This is the copy of the contract and specifications and bond in the railroad construction case.

Mr. Donnelly: We will have no objection.

The Court: It may be admitted as plaintiff's Exhibit A in this, cause number 16294.

(Copy of contract, specifications and bond admitted and marked plaintiff's exhibit A in cause No. 16294.)

Mr. Weller: We shall also ask to have admitted in this case the certified copy of the condemnation proceedings because, if the Court please, this case necessarily depends upon the other. In other words, if we fail in the other case, naturally this would fall also.

The Court: It may be understood, then, that plaintiff's exhibit B in the former case is an exhibit in this case.

Mr. Weller: Yes, Your Honor.

(Certified copy of condemnation proceedings admitted in evidence and to be marked plaintiffs exhibit B in cause No. 16294.)

Mr. Weller: I think that is all, Your Honor.

Mr. Donnelly: Now, have you checked the Complaint in the railroad case. I don't know, as a matter of fact; I presume they contain the same allegations of authority that they did in the first one.

Mr. Weller: Yes. We haven't stipulated in this railroad case yet, have we?

Mr. Donnelly: Well, I suggest that any extra stipulation you make now—— (interrupted.)

Mr. Weller: Well, it will be stipulated between counsel for plaintiff and for the defendants in this case, number 16294, the same stipulation that was contained in cause [fol. 160] number 15668; and in addition thereto the following:

That about September 1st, 1934, plaintiff entered into a contract with the United States Government, Department of the Interior, for the construction of a railroad connecting with the Northern Pacific Railway Company tracks at Odair, Washington, running thence to the site of the Grand Coulee Dam;

That the sole and necessary purpose for the construction of said railroad by the United States Government is and was for the assistance and use furnished thereby and in the construction of said dam and other works appurtenant and

necessary thereto and for the beneficial use thereof after said dam and appurtenant works are completed; That the title to all of the lands upon which said railroad construction work was performed by plaintiff under said contract had been acquired for said purpose by purchase and/or condemnation by the United States Government and that the entire performance of said contract by plaintiff was had upon said lands so acquired;

That the plaintiff had his office upon lands other than those belonging to the United States Government acquired for the purpose of this railroad at the beginning of the construction of the railroad and later, possibly when the contract was about half done, he moved his office and living quarters, which were together, to the dam site where they were upon lands acquired by the Government for the purposes of the dam and the railroad.

That the defendants, the Tax Commission of the State of Washington, have made demand upon plaintiff that he furnish reports of the amounts received by him from the United States in payment of the performance of said contract under the occupation tax laws and have threatened to begin action to recover the tax.

Now, is there anything further, Mr. Donnelly?

Mr. Donnelly: It will be stipulated also in that case that Mr. Ryan, in the performance of the contract, made the [fol. 161] reports to the Department of Labor and Industries?

Mr. Weller: Yes, he did. I might state that he performed this contract himself and made his regular reports to the State of Washington, to the Department of Labor and Industries, and paid the premiums therefor.

Mr. Donnelly: And that the sub-contractors, such as they were, did the same thing.

Mr. Weller: Well, I think there were no sub-contracts in this case at all.

Mr. Donnelly: The conclusion that the entire performance of the contract by the plaintiff was had upon such lands so acquired, it will be stipulated to, and that the actual performance of the actual manual labor was done upon the right of way of a certain width that was either purchased or condemned by the Federal Government.

Mr. Weller: That is true.

Mr. Donnelly: The State maintains, however, that it would have been impossible to perform the contract entirely there

and this will be shown by certain terms of it. In that connection it will claim that the office and supervision, the necessary supervision from the office, will be a part of the performance.

Mr. Weller: At the time the contract was actually let, Mr. Ryan's office was at the dam site and when that work was finished, and before he commenced the railroad construction, he removed his office to Coulee City where it was maintained for about half the performance of the railroad contract and then moved back to the dam site upon Government land.

Mr. Donnelly: It will be stipulated that the railroad was completed for the dam purposes as now being operated by the MWAK Company in that connection?

Mr. Weller: Well, that is part of Mr. Graves' case rather than ours.

[fol. 162] Mr. Donnelly: And that the right of way for the railroad is approximately thirty miles in length and is not shown upon the map which will be introduced in evidence in the MWAK Company case.

Mr. Weller: That is correct.

Mr. Donnelly: It is stipulated the Government did furnish it in accordance with the terms of the contract and, with one exception, the title has been acquired.

Mr. Weller: And that is being condemned.

Mr. Donnelly: The right of possession has been granted.

Mr. Weller: Yes, that is correct.

Mr. Donnelly: The allegation, Mr. Weller, that will be stipulated to that suit is about to be commenced, that is, it is understood to the extent if we make a demand in the course of this action, the ordinary process of the court will be invoked against him; that is what you mean, is it?

Mr. Weller: Yes, and this action is brought for an injunction to prevent that.

Mr. Donnelly: Yes. In the first Ryan case, Mr. Weller, for what it is worth, will you stipulate that Mr. Ryan has sub-let the contract to Mrs. Paine or entered into some negotiations for that and that a lawsuit in the Superior Court of Spokane County was brought by Mrs. Paine for the damages which were recovered in that Court?

Mr. Weller: That is true. I don't think it is material.

Mr. Donnelly: And that this was done from the office in the Davenport Hotel.

Mr. Weller: Yes, that is correct. I don't think it is material at all, Mr. Donnelly.

Mr. Donnelly: Our position is that he was doing his work by sub-letting.

Mr. Weller: Yes, that is true.

[fol. 163] Mr. Donnelly: Then, in the railroad case, we will call it, the State will rest with the addition of such facts as will be disclosed by the later stipulation.

Mr. Graves: May it please Your Honor, the suit of the Silas Mason Company et al. against the Tax Commission, number 15850, is a suit in equity for an injunction based upon constitutional grounds to prevent the Tax Commission from taking any steps toward the laying of a tax under the occupational tax law of 1933.

The Silas Mason Company is a corporation organized under the laws of the state of Delaware. The plaintiff, Walsh Construction Company is a corporation organized under the laws of the state of Iowa, and the co-partnership of Guy F. Atkinson and George H. Atkinson and William E. Kier, are doing business as partners under the name of Atkinson-Kier Company and they are all non-residents of the state of Washington.

The plaintiffs Mason, Walsh, Atkinson, Kier Company is a corporation organized under the laws of the state of Delaware and is the agent through which the other parties are doing the work which is involved in this action.

May I ask if Your Honor has read the pleadings in this case?

The Court: No, I have not.

Mr. Graves: I will go a little bit more in detail, then. When the Bonneville Dam project was afoot, the Silas Mason Company and the co-partnership of Atkinson-Kier Company bid on the work for the construction of that dam. They were unsucessful in their bid, and they then determined, in connection with another party which was afterwards known to be the Walsh Construction Company, to look into the construction of the Grand Coulee Dam and perhaps make bids thereon. They did make the investigation and did submit bids for that work. The three who bid were the Silas Mason Company, the Walsh Construction [fol. 164] Company and the Atkinson-Kier Company. They were the successful bidders for the construction of the Grand Coulee Dam, being awarded the main part of the construction at twenty-nine million and some hundrers of thousands of dollars.

After their bid was accepted they were required to give a

five million dollar bond and that took some months to be arranged for. During that time the Guy F. Atkinson Company, a co-partnership not bidders on this work, but related to the Atkinson-Kier Company, sunk some test pits there to see what the prospects were for successful carrying out of the contract. The bond was secured and filed in September and they thereupon became the successful- or the contractors for the construction of the dam.

They thereupon organized the Mason-Walsh-Atkinson-Kier Company, a corporation under the laws of the state of Delaware, which was brought into being by the three contractors, the Silas Mason Company, the Walsh Construction Company and the Atkinson-Kier Company, for no other purpose than to construct the dam as the agent for the contractors.

The United States statute forbids assigning such contracts as these and, as it was necessary for the successful performance of the work, to keep this particular work segregated from their other work in which they were engaged, they had to have this intermediary to do the work. That company opened offices in the state of Washington in the city of Spokane and from those offices it arranged for purchases, received bids for work, for machinery and supplies and so forth, that would be needed on the construction work when begun.

From those offices, also, they dictated the doing of such preliminary work as was necessary at the dam, the construction of administration buildings, the construction of houses in which people employed upon the work could live, and so forth.

[fol. 165] As soon as those buildings were completed at the dam site, which is now what I will refer to as the Government Reservation, they moved their offices there and then worked again under their contract. Everything that was done in Spokane was merely preliminary to it, making such arrangements as would be necessary to be made in preparation for such a work.

Since that time the work has progressed, as we will attempt to show, wholly upon this Government Reservation, a map of which will be put in evidence. There was one exception or so that will be claimed by my brother for the State, and that was that the Government constructed a railroad from the town of Odair on the Northern Pacific Railroad to the dam site.

Under the contract with the Government, the plaintiffs were required to operate that road. They didn't own it, didn't construct it; it was constructed and owned by the Government. But they were required, as I say, to operate the road at their own expense. That railroad is used solely for the hauling of Government supplies and supplies for the plaintiff in this action. It is solely to furnish a means of getting the material that is needed for the construction of the dam upon the dam site that that road was constructed and is used. I think, perhaps, that is sufficient outline of the facts.

On the law of the case, I will say that our points are these: First, the tax which is imposed by the 1933 Act is an excise, a privilege tax upon the business, upon the right to do business, upon business activities within the state of Washington.

The plaintiffs are engaged in no other business, at least, there is nothing else that is affected by this action, than the construction of the Grand Coulee Dam and they are doing that under and by virtue of a contract with the United States.

The tax which the State is seeking to lay is computed upon the gross income received by plaintiffs for the per- [fol. 166] formance of the contract, of their contract with the United States. Under repeated decisions of the Supreme Court of the United States, the tax upon the income derived from a contract with the United States is a tax upon the contract itself and, as such, it cannot be recovered. I imagine it will be conceded that the State could not lay a tax upon the contract itself, so that the burden on this first point lies upon us only to establish that the tax measured by gross income is a tax upon the contract itself.

I may state that point in another way. In questions of taxation arising under a contract with the United States, the question is whether the tax is a direct or an indirect burden upon the contract. It is just the same as it is where the question of interstate commerce is involved. Where that is a question, if the tax is a direct burden upon interstate commerce, it is, of course, invalid; while, on the other hand, if it is only an indirect burden, it may be sustained.

So here, the tax being upon gross income derived from this contract is necessarily a direct burden upon the contract; a tax which was measured by net income might be, but would not necessarily be a direct burden. It would

be presumably an indirect burden. And if we were to seek to establish it as a direct burden, we would have to show something more than the fact that a tax was laid upon the net income. But the Supreme Court of the United States has said that is a well settled rule that the distinction between what is a direct and an indirect burden may be determined by whether the tax is upon the gross income or upon the net. And has said that always where the tax is upon the gross income, it is a direct burden, while, if it is upon the net, is, presumably at least, an indirect burden. That is our first point.

And our second point is the same that has been suggested by my brother Weller here, that this work is carried on upon a reservation owned by the United States, over which the [fol. 167] State has ceded jurisdiction. I will have a little evidence to introduce but not very much.

The Court: You may proceed.

Mr. Groves: I offer in evidence the contract between the United States and the Silas Mason Company, Walsh Construction Company and Atkinson-Kier Company, which has been referred to.

The Court: It may be admitted.

(Contract between United States and Silas Mason Company, Walsh Construction Company and Atkinson-Kier Company admitted and marked plaintiff's exhibit A.)

Mr. Graves: I offer next the specifications under which this work was done, not in their entirety, however, but pages 15 to 89 of the specifications. Those are the printed conditions. The other matters are maps and drawings and engineer's details which would be of no information to the court. Mr. Donnelly thinks there might be some point in having it all in, so I will put them in as a whole, the specifications.

The Court: They may be admitted.

(Specifications above referred to admitted in evidence and marked plaintiff's exhibit B.)

Mr. Graves: I offer, as one exhibit, a letter from F. A. Banks, construction engineer for the United States Department of the Interior, Bureau of Reclamation, at the dam, addressed to ourselves, attorneys for the plaintiff, stating what the lands are that are used by the Government at the Grand Coulee Dam, how the title was acquired and

the uses to which they are put; and with that a map to which the letter refers, which shows the lands acquired by the United States and, by tracings, shows where the works are located and the use to which the various parts are put. I offer the map as explained by the letter and by the tracings which appear thereon and the explanations which go with it.

[fol. 168] The Court: You offer the two as one exhibit?

Mr. Graves: Yes, Your Honor. There are three pages of the letter and the one map attached to it.

Mr. Donnelly: I think there will be some explanation supplemental to that.

The Court: It may be admitted.

(Letter and map above referred to admitted in evidence and marked plaintiff's exhibit C.)

Mr. Graves: I offer in evidence the first report of the Columbia Basin Commission of the State of Washington dated at Spokane, Washington, on December 19th, 1933. This is the first report of the Columbia Basin Commission.

The Court: It may be admitted.

(First report of Columbia Basin Commission of State of Washington, dated at Spokane, Wash., December 19, 1933, admitted in evidence and marked plaintiff's exhibit D.)

Mr. Graves: I offer next the second report of the Columbia Basin Commission dated at Spokane, Washington, January 22nd, 1935.

The Court: It may be admitted.

(Second report of Columbia Basin Commission of the State of Washington dated at Spokane, Washington, January 22, 1935, admitted and marked plaintiff's exhibit E.)

Mr. Graves: And Your Honor already has a copy of the Rivers and Harbors Bill containing the authorization for the construction of this dam.

The Court: Yes.

Guy F. Atkinson, being a witness called on behalf of the plaintiff Silas Mason Company, having first been duly sworn, testified as follows:

[fol. 169] Direct examination.

By Mr. Graves:

Q. Your name is Guy F. Atkinson?

A. Yes, sir.

Q. What is your business?

A. General contractor.

Q. Are you a member of the partnership of Atkinson-Kier Company, one of the bidders for the construction of the Grand Coulee Dam?

A. I am.

Q. Please tell me the history of your connection with that dam, how you came to be bidders on it, how you came to be associated as you were in the contract.

A. Well, I had known Silas Mason for a number of years and when the main dam at Bonneville came up, I asked him to bid with us on that job. It was too large for us to handle. And we put in a bid on that job, but we were not low bidders. The Cou-ee Dam came up shortly after and he telephoned me from New York and asked if we wanted to bid and I told him we could take part of it, so we went ahead and figured the job and a few days before the bid went in, why, Mr. Walsh came out and the three of us decided to bid together, bid in the three different names, Silas Mason Company, Walsh Construction Company and Atkinson-Kier Company.

Q. Now, of what state are you a resident?

A. California.

Q. And the other members of the partnership of the Atkinson-Kier Company?

A. All from California. Kier was from San Diego and we are from San Francisco.

[fol. 170] Q. What is the general business of this partnership?

A. Well, this partnership was a special partnership organized to bid on some of these larger jobs.

Q. Is it a special partnership?

A. Yes.

Q. For the purposes of this bid?

A. For this bid and other large jobs. The W. E. Kier Construction Company operates out of San Diego and the Guy F. Atkinson Company operates out of San Francisco. When we bid together we bid as Atkinson-Kier Company, a separate partnership.

Q. None of the members of that partnership have ever been residents of the state of Washington?

A. Not until we moved up to do the work.

Q. Just for the purpose of this work?

A. Yes.

Q. Are you engaged in any other business in the state of Washington, the partnership, than the carrying on of this work?

A. No, sir.

Q. Now, with respect to the Silas Mason Company, that is a corporation; what is its business?

A. General contracting.

Q. And where are its operations carried on, if you know?

A. Well, different parts of the country. Their chief office is New York City, 500 Fifth Avenue, New York City.

Q. Is it engaged in any other operations in the state of Washington than in the construction of the Grand Coulee Dam?

A. No, sir.

Mr. Graves: You won't mind if I lead a little bit, Mr. Donnelly?

Mr. Donnelly: No, not at all. Go right ahead.

Mr. Graves:

Q. The Silas Mason Company came to this state solely [fol. 171] for the purpose of bidding on and, after its bid was accepted, of performing this contract that is involved in this suit; is that right?

A. Yes, sir.

Q. Now, about the Walsh Construction Company, where are its headquarters?

A. Davenport, Iowa.

Q. It also is a contracting company?

A. Yes, they do work all over the country.

Q. And has it any other work in the state of Washington than that involved in this case?

A. No, sir.

Q. It came here, did it, for the purpose of engaging in that work?

A. Yes, sir.

Q. Now, you spoke something about bidding on the Bonneville Dam, the partnership of Atkinson-Kier Company and Silas Mason Company.

A. Yes, that is the way the bid was put in on the Bonneville job.

Q. That bid was submitted where?

A. Portland, Oregon.

Q. And was for the construction of a dam across the Columbia River between the states of Oregon and Washington?

A. Yes, that was the main dam between Washington and the island.

Q. The partnership of Guy F. Atkinson Company had a smaller contract, did it not, on that Bonneville Dam?

A. Yes, we had the first contract at Bonneville, which was the excavation for the locks and the power house dam. That was across the slough, over to Bradford Island. That is where our work was located but this large dam bid in by Silas Mason was the dam across the main channel.

Q. The firm of Guy F. Atkinson had no relation to Atkinson-Kier Company except that you and your son, George H. Atkinson, were partners in both firms?

[fol. 172] A. Yes, that is the case.

Q. Approximately, when was your bid for the construction of the Grand Coulee dam accepted?

A. Well, we bid on the job on June 19th. There was a wire sent out from Washington on July 16th accepting our bid. We didn't get it until the 17th. Both dates were 1934. About four weeks after we bid, before our bid was accepted.

Q. What was the first thing that you did after the acceptance of that, Mr. Atkinson?

A. Well, we proceeded to procure a five million dollar bond.

Q. How long did that take you?

A. Well, that proved to be a big job. It took all of the responsible bonding companies in the country to sign that bond and we were in New York between six weeks and two months negotiating for that bond. And it seemed that when we would get one obstacle overcome the attorney for some bonding company would find something else that he wanted cleared up and it was quite a big job to secure the bond. In fact, before the job was let, the bonding company said that the bond couldn't be written because the bonding company's finances had depreciated so much since the hard times that they notified the Government that the bonding

company could not furnish a five million dollar bond and they would not write a bid bond for us. So, when we put in our bid, we put in a two million dollar certified check instead of a bid bond because the bonding companies refused to write a bid bond and frankly told us that they did not think a five million dollar bond could be secured.

After we got the contract, that is what we had to start on with. They thought they couldn't do it and we had to sell it to one company and then another company, there-
[fol. 173] fore it took us two months to secure that bond.

Q. A number of bonding companies signed that bond ultimately, did they not?

A. Twenty-four companies signed and a great many of them took reinsurance on what they signed for.

Q. Those negotiations were all carried on in New York?

A. Yes.

Q. After you procured the bond, what next did you do, Mr. Atkinson? When I speak of you I mean the three contractors, the three successful bidders.

A. Yes. Well, while we were getting this bond, we agreed on our company organization and incorporated the Mason-Walsh-Atkinson-Kier Company in Delaware on September 14th, 1934, and the bond had all been signed up but was not to be delivered to us until our incorporation was complete and an agency agreement was signed, an escrow agreement was signed, but we had all of that worked up, so when we incorporated on the 13th day of September, the next day we held our organization meeting and delivered our agreements to the bonding companies. They delivered our bond and then we were ready to do business. That was on the 14th of September. On the 17th of September—— (interrupted.)

Q. Well, now, may I interrupt you a minute there? The Company you refer to was the Mason-Walsh-Atkinson-Kier Company, one of the plaintiffs in this case?

A. Yes.

Q. And the purpose of its organization was to do the actual work on the dam as an agent for the three contracting firms?

A. Yes. Then our business in New York was all organized on September 14th. Our bond was filed with the Government in Denver on September 17th and our checks were then released, the two million dollars that had been on de-

[fol. 174] posit was returned to us at that time and you might say we had a contract for Grand Coulee Dam, although the contract stated that we should not—that our time would commence when the Government notified us to proceed. Of course, our bond was filed, which the Government was satisfied with, but our contract, I don't think, was actually legal until it went to Washington and was approved, so we received a notice to proceed. I don't know as to the exact date of that, but sometime in October, and then you might say that the contract was fully completed.

Q. What were the first steps that you took?

A. Well, we all gathered at Spokane and there was hundreds of equipment men, material men, waiting there to see us. We talked to them and we opened offices in Spokane. We had to have room.

Q. Spokane is how far from the dam site?

A. One hundred miles.

Q. There was at that time nothing whatever at the dam site except a few scattered buildings?

A. No.

Q. And there was no town of any size nearer to the dam site than Spokane?

A. Well, there is the town of Almira about twenty miles from there.

Q. A small place of a thousand people, or such a matter?

A. Yes. Spokane was the only place we could get in and out to start the work; so we opened this office there and we received these different equipment men and let them explain the merits of their equipment and some conditional orders were placed. But the main thing was to get a line-up as to what we were going to do and we just took these fellows' prices and tabulated them and as soon as we could get our headquarters building out at the camp we moved our offices all out to the dam site. And there is where all the business was done and has been since.

[fol. 175] Q. Now, among other things that you did in Spokane, you arranged for a planing mill and lumber mill there to furnish houses which could be set up, and buildings and so forth?

A. Yes, we arranged for them to build us so many ready-cut houses in sections and we hauled them out. We could put them up much faster and the trouble was at the start that we had no way of housing our men. We were putting

up the camp so it was a great help to us to get these houses that were already constructed in sections, and some of those three-room houses, I think it took about six men to set up one of them in a day and it hurried the work and let us get into camp much quicker.

Q. Now, during the time that this was being done, were office buildings in process of construction out there at the dam site?

A. Yes, that was about the first building we started on, was the general office building.

Q. When did you move your offices out to that place, out to the dam site?

A. Well, I couldn't give you the exact date. I would say the latter part of October, just about.

Q. Just as soon as they were completed?

A. As soon as we could get the building up, and it was just a wood constructed building with wall-board, no plastering or no chimneys. They do all the heating there by electricity. As soon as we could get that building up, we moved right in.

Q. Was any actual construction work done until after you had moved your offices out to the dam site?

A. On the dam?

Q. I mean construction work under this contract. Understand that is what I am referring to always, your contract.

[fol. 176] A. Yes.

Q. There was nothing done, you say?

A. No, we had nothing to work with. We had no place to house our men. The first thing we had to do was to get our offices and cook-house up and I think our cook-house opened about the last day of October or November, I wouldn't be sure as to the date. And when we got moved out there—— (interrupted.)

Mr. Donnelly: The report shows November 2nd. I don't know whether that is exactly accurate.

A. Well, that is probably it.

Mr. Graves: Your Honor will understand with respect to this work that I am referring wholly to the contract which is involved in this particular action, for the construction of the main dam. There was preliminary work done by Mr. Ryan and perhaps other contractors there, pre-

liminary work, but I am referring only to the work done under this particular contract.

The Court: I understand.

Mr. Graves:

Q. You didn't do any work, then, for which you received any *companies* until after you moved down there?

A. No, sir.

Q. Now, Mr. Atkinson, referring to this railroad out to Odair—well, the specifications under which you did this contract provided for the construction of a railroad for use in transporting construction materials to the dam site. That railroad was to be constructed by the Government from the Northern Pacific Railway at Odair, Washington, to the camp site and provided, also, that you should operate that railroad, when constructed, at your own expense. That [fol. 177] railroad was build by the Government?

A. Yes, sir.

Q. And has been operated by you since its construction?

A. Yes, sir.

Q. What is hauled over that railroad?

A. Just our material, lumber, steel work, equipment.

Q. The contract provides that certain portions of these materials shall be furnished by the Government, I believe?

A. Yes, the Government furnishes all cement, all reinforcing steel and some pipe.

Q. Is the material which is furnished by the Government hauled over that railroad, also?

A. Yes, the Government delivered all that material to us at Odair.

Q. And you have to haul it in from there?

A. Haul it in as part of our contract.

Q. Is anything hauled over that line except material designed for construction of the dam, either by you or by the Government?

A. No, sir. We hauled a carload of coal for the church over in Coulee City, but we hauled it free.

Q. You hauled it for what?

A. The church. There is a church at Coulee City and they had a carload of coal they wanted hauled in and we told them we weren't a common carrier, but told them we would bring it in free.

Q. Some such hauling as that, you have done as a matter of public accommodation?

A. That is all. Otherwise, everything we haul is for ourselves or under contract with the Government.

Q. The checks that have been received for the construction work as it progressed, how were they made out?

[fol. 178] A. The checks were made out to Silas Mason Company, Walsh Construction Company and Atkinson-Kier Company; but about the time we started we asked the Government to have them made to the Mason-Walsh-Atkinson-Kier Company, they being the agents and the people that were doing the work. And they had us sign some blanks whereby they recognized the Mason-Walsh-Atkinson-Kier Company as the agents. But the checks still come made out to the original bidders. We have a rubber stamp that says, "Pay to the order of the bank", the three original bidders' names stamped on, and then "By Mason-Walsh-Atkinson-Kier Company, attorney in fact." And the Mason-Walsh-Atkinson-Kier is signed by one of the officers of our corporation.

Q. And those checks are delivered to the Mason-Walsh-Atkinson-Kier Company and used by it?

A. Yes, sir.

Mr. Graves: That is all.

Cross-examination.

By Mr. Donnelly:

Q. Mr. Atkinson, I wonder if you remember—I am refreshing myself as to some dates from the report which is in evidence. That may not be just right. Do you remember when the contract was made with the Washington Water Power Company for the electric light and power for the project?

A. Well, I don't know as to the date.

Q. It says here on October 8th.

A. I would think that was about right.

Q. That was required to furnish the power for all the project at the dam?

A. Yes. That contract had to be signed up because after we made the contract, then we had to build a thirty mile

[fol. 179] transmission line from Coulee City where we connected on to their line into the dam site.

Q. You built that by sub-contract?

A. Yes.

Q. Did you move down there before you got the electric light and power down there?

A. Yes. There was a little electric light plant at Grand Coulee Dam run by three fellows from Seattle. They called them the three engineers. A Diesel electrical plant. And we had lights there, not enough to run our whole camp, but we had lights there and had heat there before our high tension line was brought in.

Q. It says here the high tension line was completed about November 18th, or on November 18th.

A. I think that is about it.

Q. And on October 16th you started work on a temporary trestle and bridge across the Columbia River?

A. Yes.

Q. On October 27th they started to work on the contractor's railroad. Did you have to build the railroad, or does ther refer to Ryan?

A. No, Ryan, I think, had started before that. We had certain sections of railroad to build to connect up; the Government brought the railroad into Grand Coulee Dam site down the hill and if we wanted to take it any further we had to connect up. So we decided to put our railroad bridge down the river about half a mile, so it necessitated about a half mile of track down the river and there was some very heavy rock work and a tunnel; and we went to work and done that among the first things while we were getting into camp.

Q. Now, Mr. Atkinson, the report here shows that as soon as the performance bond was furnished, and they put that at August 13th, that the corps of engineers were in the [fol. 180] field to lay out the camp and men were set to work making test pits.

A. They set that at what?

Q. August 16th.

A. No, the performance bond was not furnished or filed until September 17th. What report is that?

Q. That is the Columbia report. I thought that was different from what you said.

Mr. Graves: That is the Columbia Basin Commission report, is is not?

Mr. Donnelly: Yes.

A. (Continued.) They are in error because the bond wasn't delivered to us in New York until September 14th and we sent it by special messenger by airplane to Denver so it would be there Monday morning, on the 17th.

Mr. Donnelly:

Q. I believe your reports of Guy F. Atkinson Company, you made some reports to the Department of Labor and Industries that actual work had started, as a partnership, I believe.

A. Well, here is what happened. After the Government awarded us the contract on July 16th, the job being so large and not having had time to make the necessary investigations that should have been made on a thirty million dollar job before—of course, we did, we made investigations to satisfy ourselves enough to make a bid—but we didn't know just what course we were going to pursue in doing the work in handling the river Grand Coulee Dam is a very, I would say, treacherous job of taking care of the river. At Boulder Dam they handled it by building tunnels and turning the water through, but at Grand Coulee we had to take care of the river all of the time, part of the time through a channel and then bring it back and put it over the concrete while we were doing the other side. And we were very apprehensive as to what kind of coffer-dam we should build and therefore we wanted to know what the condition [fol. 181] of the ground was where we had to put this coffee-dam. So about the time the Government accepted our bid on July 16th we decided to put a shaft on each side of the river to ascertain what kind of soil or material that was, down to bedrock, which was about a hundred and fifty feet or more below. So I was in New York and we talked it over there, and I advised my son, who was at Bonneville. He and Mr. Kier went up and started that work and that was handled—now, Mr. Donnelly, you were speaking of what the Guy F. Atkinson Company did?

Q. Yes.

A. Yes. Well, there was nobody that had any authority up to that time. Our corporation hadn't been organized and we couldn't speak for Walsh and couldn't speak for

Silas Mason. We could speak for ourselves, and somebody had to act. We couldn't start men to work there unless they were working for somebody that had compensation insurance and we took out the compensation in the name of Guy F. Atkinson Company and we did that particular work of putting down these two shafts which were no part of our contract. They were merely investigations, something we might have done before we bid on the work. We didn't have our contract at the time, so it wasn't part of the contract because our contract was not a legal contract until six weeks after that; and that is the reason that that was handled by Guy F. Atkinson Company there. That was the only one that could apply for employer's liability insurance and we didn't do the work under sub-contract. We just did it, and we were reimbursed by the Mason-Walsh-Atkinson-Kier Company after its organization.

Q. You did some work. Did you do any work prior to September 17th, the time when you had notice to proceed?

A. No, except this exploratory work, was all.

Q. At the dam site?

[fol. 182] A. That was done in July and August and it wasn't part of our contract. It was just merely ascertaining what ground we might anticipate in driving our cofferdam. The MWAK Company made its first report to the Department of Labor and Industries and showed work in September or October, the Guy F. Atkinson Company.

A. Yes.

Q. And paid the premium for it?

A. Well, it might have been we sent some trucks up there. We handled all the trucks there under the name of Guy F. Atkinson Company for a while and billed the other company for it.

Q. You did that in October and September, September and October?

A. Yes, clear up to December, I think, we handled all the trucks.

Q. Yes, even after the MWAK was organized, you continued to handle the trucking?

A. We did not send any trucks up there until after the MWAK Company was organized, but we had a lot of trucks at Bonneville. We sent our trucks up there. MWAK had no trucks. We hired a lot more and the MWAK Company was pretty busy and they suggested that our men handle

the trucks, which we did up to the first of the year, I think, and finally the MWAK took it over.

Mr. Donnelly: I think that is all.

Redirect examination.

By Mr. Graves:

Q. Referring to this exploratory work done by Guy F. Atkinson Company, you have said that was no part of your contract with the Government, referring to the contract of Silas Mason-Walsh Construction-Arkinson-Kier Company. Were you ever paid anything by the Government for the doing of that work?

[fol. 183] A. No, sir. It was just investigation so we could better decide what way to proceed with our coffer-dam. We have the largest coffer-dam in the world, I presume, much larger than has ever been attempted before, and it was a very ticklish job and we wanted all the information on it we could get.

Q. That was done before you had gotten this five million dollar bond?

A. Yes.

Q. And while you were having so much difficulty getting it?

A. Yes.

Q. And I suppose it is within the bounds of possibility, Mr. Atkinson, if those test pits had shown some very bad conditions there that would have rendered the work almost impossible, you probably never would have gotten that five million dollar bond.

A. That is true. I beg your pardon, but what was shown up in that test pit helped the bonding companies at last to make up their minds that it wasn't as risky as they thought it was, because we had data on that before.

Q. Well, that was part of the information that was given them?

A. Yes.

Q. While you were in the process of getting this bond?

A. Yes.

Q. Now, what was the nearest railroad to that dam site, I mean established railroad?

A. Well, Coulee City—well, Almira was a little closer than Coulee City, but there was a private railroad to Coulee

City and that was determined to be the best railroad station to operate from.

Q. How far distanct was that?

A. Coulee City was thirty miles.

Q. And Odair was thirty miles?

A. Yes, practically the same distance.

Q. The bridge across the Columbia that was referred [fol. 184] to, the putting in of the temporary bridge there, is the contractor's camp on the same side of the river as Spokane?

A. No, it is on the other side and it was necessary. Our camp location, where the Government told us we should build our camp, was on the other side of the river from the side you land at when coming from Spokane, so we had no way of getting over there only by ferry boat, so it was necessary that we put in a good trestle bridge there so we could get our material across in a hurry in building our camp.

Q. And your principal source of supply is at Spokane?

A. Yes. That bridge was just in there—well, we put it in in the fall and we had to take it out before high water the next spring. It was just a low trestle.

Q. Just a temporary bridge?

A. Temporary bridge, yes.

Mr. Graves: That is all.

Mr. Donnelly: That is all.

(Witness excused.)

STIPULATIONS AS TO FACTS

Mr. Graves: That is the plaintiff's case, Your Honor.

The Court: Have you any evidence, Mr. Donnelly?

Mr. Donnelly: None except as we will stipulate. Now, Mr. Graves, you understood that the exhibits attached to the complaint are in evidence?

Mr. Graves: Oh, yes. I would have proved some of the matters alleged there, but they are admitted, and I didn't refer to them.

Mr. Donnelly: And it is agreed that the allegations of the Answer, there are certain facts in exhibits D and E, the Columbia Basin reports, that we will want to refer to, and I take it they are now introduced in evidence and the allegations therein are presumed to be correct.

[fol. 185] Mr. Graves: Yes, they can be presumed to be correct. I think probably they have got them correct except maybe something that don't amount to anything.

Mr. Donnelly: I might state to the Court at this point the particular things that will be pointed out in here, although that will be done more fully in argument.

The Court: I think you had better wait until you make your argument.

Mr. Graves: I suppose it will be understood those Commission reports boost the Commission's work?

Mr. Donnelly: Very flattering.

Mr. Graves: They have to give a good account of themselves.

Mr. Donnelly: Now, Mr. Graves, there is a slight change that you know of in the contract. Now, is that material?

Mr. Graves: I don't consider it material. If you wanted to get that properly, you would have to have an engineer testify.

Mr. Donnelly: The fact is that the original dam was let as a power project and the specifications of the MWAK contract were changed recently to lower and widen it, so that it is, in fact, a base for the ultimate higher dam which will be an irrigation project.

Mr. Graves: Yes, the Government reserved the right to make such changes as it desired in the contract, subject to adjustment.

Mr. Donnelly: Yes. The principal thing the State would like to stipulate with reference to the plaintiff MWAK exhibit C, the map and letter, will you correct me if I say anything wrong, Mr. Graves?

Mr. Graves: Yes.

Mr. Donnelly: It will be stipulated that the map introduced in evidence as a part of Exhibit C is correct, and that it correctly shows property acquired by the Federal Government for the work in progress. There is, however, no [fol. 186] established reservation as such, either by the Secretary of the Interior or by Act of Congress and no plat with definite boundaries filed. The map shows the extent of the land acquired now in the vicinity of the dam itself.

In Addition to this there is being acquired flowage lands above the dam on both sides of the river by the Federal Government. It is in the process of being acquired and a large lake for reservoir purposes will be made to the north

and in that process a great many thousand acres of land will be necessary, that is for the ultimate project. That in this ultimate project there will be public land, probably largely privately owned land, some state and county lands, and some school lands. That the irrigation project, if and when completed, will involve a great many acres they refer to in their report to the south, but that is not being acquired at the present time. That there is contemplated to be acquired in the immediate vicinity of the property shown on the map, exhibit C, land for the power plant. That has not yet been acquired.

The tract of land numbered 4, Your Honor, and the letter which is part of exhibit C, exhibit C refers to section 36 and in the letter it is described as section 36. Erroneously on the plat it is apparently 35. That should be and is section 36 and is a school section, section 36 being a school section of land.

The Court: It is described as 36 and marked 35 on the map?

Mr. Donnelly: 36 is correct, and in that connection, Your Honor, the engineers said it was reserved to the United States for the state of Washington under section 3380 of Pierce's Code. We use Remington's mostly, 7410 and 7412. That is a matter of law, I suppose.

[fol. 187] The two orange tracts I would like to have understood their nature, in case it becomes material. I think it may make some difference in our theory. They are described by the engineer as "tribal" lands. In that connection there has been at that point, at the very point of the dam, the Colville Indian Reservation. Is that correct?

Mr. Graves: I don't know.

Mr. Donnelly: The Colville Indian Reservation does not run there, I understand. That might make some difference in the title to the thread of the stream.

Mr. Graves: I think the Colville Indian Reservation is further down the stream.

Mr. Donnelly: Well, then it will be stipulated that the Indian Reservation does not affect any of the land on the map, Exhibit C.

Mr. Graves: That is correct.

Mr. Donnelly: That the area described as "tribal" lands and shown on the map and colored in orange, the title is in the Federal Government for the Indians in some form or in the tribes.

Mr. Weller: Well, I don't know; that doesn't affect our case and I haven't investigated, so I couldn't say.

Mr. Donnelly: And that the Columbia River at that point is a navigable river.

Mr. Graves: Yes.

Mr. Donnelly: And that there are no conveyances directly from the State to the Federal Government except the reservation as to section 36, the school section.

Mr. Graves: I want to answer that with respect to the statement as to the acquisition of other lands, flowage rights and so forth.

It is agreed that the land within the heavy boundaries here is all that is essential for the work that has been done and that is contemplated to be done in the near future. The flowage rights and any question involving other structures will be something arising in the future and are not involved [fol. 188] in the present situation.

Mr. Luby: As a matter of fact, the engineers' notes produced in 1929 show that this additional acquisition of property and the building of other dams shall extend to the year 2000, so we can't speculate about that today.

Mr. Graves: I just wanted to be sure that in the present case all that is involved in the present case is within these boundaries.

Mr. Donnelly: I believe that is a little indefinite. I think we should stipulate to the facts, the land, that is, flowage lands, and lands to create the pond are being acquired at the present time as the work progresses. The land is being acquired that is necessary.

Mr. Graves: Yes, that will be agreed. The United States is getting lands as it is necessary for its construction.

Mr. Donnelly: That the land to make the project feasible as a power project is now being acquired and a great deal of land in addition to what is shown on exhibit C has been acquired. Those are the facts.

Mr. Graves: Well, that is immaterial as we regard it, but the fact is as stated.

The Court: I don't see how it could have any bearing on the present inquiry, Mr. Donnelly.

Mr. Donnelly: I wish to make the point that no definite reservation has been established on plat——

Mr. Graves: You understand, Mr. Donnelly, that the changes in this contract do away with the dam feature and make it merely a foundation for the high dam.

Mr. Donnelly: Yes, that is why I suggested you might want to stipulate that.

[fol. 189] Mr. Graves: Well, that can be stipulated. That is the fact. The changes that are made do away with the construction of the dam that was contemplated by the original contract and provide for the construction of an enormous base which will sustain the high dam which it is contemplated will be ultimately erected and providing for the irrigation of all the big bend section.

The Court: We are only concerned now with the contract for building this foundation, as I understand it.

Mr. Graves: Yes, Your Honor.

Mr. Weller: It will also be stipulated that this change in the MWAK contract was made after the completion of the contract or contracts with Mr. Ryan. Is that correct, Mr. Donnelly?

Mr. Donnelly: I believe, after the completion of the railroad contract, yes.

Mr. Graves: What is to be constructed under this change is a part of a dam for the purposes defined in the specifications.

Mr. Donnelly: And we wish it specifically understood the land in section 36 colored in purple is being used by the contractor in the performance of this contract in the manner described. It will be stipulated that there are two regularly formed school districts in the area, one in the engineers' town and one in Mason City, under the laws of the state of Washington.

Mr. Graves: I didn't quite understand your statement, Mr. Donnelly.

Mr. Donnelly: I said it will be stipulated that there are two regularly formed school districts in the area under the laws of the state of Washington, one in the government engineers' camp and one in Mason City.

[fol. 190] Mr. Graves: Well, I don't see that it is material, but there will be no disposition to get away from that, Mr. Donnelly. I just wanted to inquire about the facts. You say there are two districts formed within these heavily marked lines?

Mr. Donnelly: Yes.

Mr. Graves: Subject to the objection as to its materiality, that is the fact.

Mr. Luby: Our contention is that it is immaterial, but

probably it had better go in and if it becomes material, why it will be in there.

Mr. Donnelly: I am advised by Mr. Schwellenbach that the district that is in the engineers' camp was established under the Bureau of Reclamation; that it required dissolution of a joint district and that this was done upon the petition of the Bureau; and that the actual status at the area—Mason City, of course, is on this area—and it is built by the contractors as part of their contract.

Mr. Graves: The engineers' camp—may we not explain to the Court what that is?

Mr. Donnelly: Yes.

Mr. Graves: That is the campe that is maintained by the United States for the offices and residences of the officers of the United States, the engineers who are employed there, and it is entirely separate and distinct from the town of the contractors which is called Mason City. It is on the opposite side of the river. So when engineers' camp is referred to it is understood to mean the land which is occupied by employees of the United States as distinguished from the contractors and their employees.

Mr. Donnelly: Now, I would like to stipulate as to the extent in which the counties involved actually participate in the government of that area, for what materiality it may have. It will have some on our theory of the case and [fol. 191] Mr. Schwellenbach is more familiar with that; maybe he could state it better than I.

Mr. Schwellenbach: That in Mason City the Policemen who are employed by the Mason Company have been deputized as deputy sheriffs of Okanogan County; that Mr. Mallock, the attorney for the Mason Company located at Mason City, has been appointed a Justice of the Peace in Okanogan County; that Dr. Sorenson, one of the doctors in the Mason Hospital, has been appointed as a deputy coroner in Okanogan County; that prior to the enactment of the Steele law, a number of beer parlors were operating in this area in Grant County under permits issued by the county commissioners of Grant County; and that in the fall of 1933 one of these operators was fined in Justice Court for operating without a permit as provided in the ordinance; that on Christmas Eve of 1933 the sheriff and prosecutor of Grant County were called to the dam site on the complaint of one of the beer parlor operators and on the following day the

man was brought into the Justice Court and convicted of assault in connection with this particular fight; that on January 25th, 1934, the sheriff of Grant County was called to the dam site on the complaint that an insane man was at large there. That is, I want it understood this is all within this area which is in controversy here.

That in November 1934, the sheriff was called to the dam site in this area to investigate the theft of some water taps in the possession of a sub-contractor operating on this property; that about the same time the prosecutor was called there as coroner to investigate the accidental death of a man killed while working for Priek and Kinney, contractors, who were building the railroad and highway on this property; that a man named Louis Kroll is operating a beer parlor right down on the river in this area and has been selling beer under a license issued to him by the Liquor [fol. 192] Control Board of the state of Washington; that at various times the coroner of Grant County has been called down to this area to investigate the accidental death of men who were employed by the contractors on this particular area.

Mr. Donnelly: You are the coroner?

Mr. Schwellenbach: Yes, in this particular area.

The Court: You are asking to have those facts stipulated?

Mr. Schwellenbach: Yes, Your Honor.

The Court: Do I understand they are agreed to, subject to their materiality?

Mr. Luby: Subject to raising that question at any time as to materiality.

Mr. Graves: I have no doubt in that country they rustle around considerably.

Mr. Donnelly: I would like to have it stipulated that the MWAK Company have regularly made applications to the Director of Licenses for the state of Washington for refund of the gasoline tax paid in the area on the grounds, among others, of operating trucks illegal for use on the highway and that they are over eight feet in width; and that, under the law as construed prior to the going into effect of the 1935 Act, refunds were regularly made to the MWAK of such gasoline taxes as were paid as were used in the machinery on the dam and trucks that were too large to operate on the highway.

Mr. Graves: Subject to the objection that it is immaterial, the facts are admitted.

Mr. Donnelly: That prior to the construction of the railroad from Odair to the dam site the contractors transported the materials by truck of such proportions that a special permit was required to operate on the public highway; and that such special permits were granted by the state authorities.

Mr. Graves: Subject to materiality, that is admitted.

[fol. 193] Mr. Donnelly: That there are two private corporations in Mason City, the Coulee Trading Company and the Mason City Company, which transact private business; which is the hotel and moving picture theatres and gasoline distributors and general merchandise business. That, as to private parties in Mason City, the appropriate state tax was collected and paid to the state, sales tax, admission tax, and that no sales tax is, in fact, collected on sales by this company to the Mason-Walsh Company in that area.

That the Mason-Walsh Company, operating its mess hall, collects the tax itself and pays it to the state on meals sold to other than employees of the company;

That the Mason-Walsh-Atkinson Company—I am not sure whether counsel has stated it—is qualified to do business in the state. They have qualified to do business in the state of Washington.

Mr. Graves: I think that is pleaded. All of this goes in subject to our objection as immaterial. The facts are agreed where we do not dissent.

Mr. Donnelly: Yes, I understand also that a great amount of this may be inadmissible that is in evidence already.

Mr. Graves: Yes.

The Court: Well, these questions will be raised at the time of the argument, no doubt, and considered by the court.

Mr. Donnelly: Now, if the Court please, as to the amount of the evidence which Mr. Graves and I have stipulated, I understand may be used in the Ryan cases. Under our theory of the case the state feels that the character of the reservations is in issue and we would like the stipulation as to the map to be a part of that and that the letter accompanying it and those stipulations be made a part of the Ryan case.

[fol. 194] Mr. Weller: That may be done.

Mr. Donnelly: Would there be anything wrong with

stipulating so far as material in the MWAK case that the stipulations may apply in the Ryan case?

Mr. Weller: Well, the question in regard to that would be in the making up of the record, Mr. Donnelly. So far as the stipulations with Mr. Graves are concerned, I know that a good many of them are true and I don't question the truth of any of them; but a lot of them are not applicable to our cases. It might be rather difficult to make up the record unless we should stipulate that certain of those should apply in our cases.

Mr. Donnelly: Well, I went along here each time without calling attention to what cases, Mr. Weller.

Mr. Weller: It is agreeable to us that any of the matters which have been stipulated here which are applicable to the Ryan cases may be used in those cases. The only thing would be the difficulty of segregation.

Mr. Donnelly: Well, in general, we wish to show the area, the nature of the area, the map and the way it is actually used now.

Mr. Weller: So far as the map is concerned, that is perfectly agreeable to us; but, as Mr. Luby suggested, so many of the things which have been mentioned here happened after Mr. Ryan had completed his two contracts they could not affect him in any way.

Mr. Graves: As you introduced the evidence in the other cases, as we went along, I stated what I wanted included in this case, something that went into the Ryan case, I noted that.

Mr. Donnelly: Well, I believe if the States offers a daily transcript here of what has happened, that we can get at it later.

Mr. Weller: Yes.

Mr. Donnelly: And rest on the stipulation now as made.

Mr. Weller: That is satisfactory.

[fol. 195] Mr. Donnelly: As a final thought, I wonder if it will be too much, after we look over the stipulations, anything additional or anything wrong that should be taken away that we can agree on it tomorrow?

Mr. Graves: That is all right.

Mr. Donnelly: Then we will rest with that understanding.

Mr. Graves: We have no rebuttal evidence.

The Court: Both sides rest, then, I understand.

Mr. Donnelly: I presume the appellant Ryan and the plaintiff will proceed.

The Court: I presume so.

(Arguments of counsel.)

Excerpt from the Statement of Facts beginning with line 9 on page 4, to and including page 60, in the case of Silas Mason Company, Inc., v. Tax Commission of the State of Washington, No. 26059.

[File endorsement omitted.]

[fol. 196] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 197] SUPREME COURT OF THE UNITED STATES

ACCEPTANCE OF SERVICE

Service of copy of Appellants' Statement of Points Relied upon and Designation of Parts of the Record to be Printed in the above entitled cause is acknowledged this 24th day of February, 1937.

E. P. Donnelly, Attorneys for Appellees.

[fol. 198] SUPREME COURT OF THE UNITED STATES

Appellants' Statement of Points Relied Upon and Designation of Parts of the Record to be Printed—Filed March 3, 1937.

POINTS RELIED UPON BY APPELLANTS

Appellants intend to rely upon the following points as ground for reversal of the judgment of the Supreme Court of the State of Washington from which the appeal herein is taken:

That the statute of the state of Washington imposing an occupation tax is unconstitutional and void as applied to the particular transactions stated in the complaint of appellants in this:

I. That the challenged tax is levied directly upon the consideration paid by the United States to the appellants

[fols. 199-201] for the performance of a contract by means of which the United States government is carrying on a governmental enterprise. The Supreme Court of the State of Washington erred in holding such a tax to be a valid exercise of the taxing power of the State, and erred in confirming the judgment of the Supreme Court of the State of Washington, for Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

2. That the contract between the United States government and appellants upon which the challenged tax is levied is being performed upon land acquired by the United States for the purpose. Exclusive jurisdiction over this land has been ceded by the State of Washington to the United States. The Supreme Court of the State of Washington erred in holding that the State of Washington has power to tax the occupation carried on by appellants in that territory, and erred in affirming the judgment of the Superior Court of the State of Washington for Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

PARTS OF RECORD TO BE PRINTED

Appellants state that the whole of the record sent up from the Supreme Court of the State of Washington in accordance with the praecipe filed in this court jointly by appellants and appellees, is necessary for the consideration of the case and should be printed.

Dated this 23d day of February, 1937.

B. H. Kizer, Oswald L. Graves, Counsel for Appellants. Graves, Kizer & Graves, of Counsel for Appellants.

[fol. 202] [File endorsement omitted.]

Endorsed on cover: File No. 41,313. Washington Supreme Court. Term No. 773. Silas Mason Company, Inc., Walsh Construction Company, et al., appellants, vs. Tax Commission of the State of Washington, et al. Filed March 3, 1937. Term No. 773, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 773

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER AND ELMER L. KIER, COPARTNERS AS ATKINSON-KIER COMPANY, AND MASON-WALSH-ATKINSON-KIER COMPANY,

Appellants,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON; HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, CONSTITUTING THE TAX COMMISSION OF THE STATE OF WASHINGTON,

Appellees.

STATEMENT AS TO JURISDICTION.

The jurisdiction of the Supreme Court of the United States is invoked under the Judicial Code, section 237(a), as amended by the Act of February 13, 1925, U. S. C. A., Title 28, section 344(a).

The statute of the State of Washington, the validity of which is drawn in question on the ground of its being repugnant to the Constitution and laws of the United States, is the Occupation Tax Act of the State of Washington, Chapter 57, Laws of Washington, Special Session 1933, com-

mencing at page 157. This Act provides for the levy and collection

> "from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business * * * an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent."

The decree of the Supreme Court of the State of Washington was rendered October 28, 1936. A petition for rehearing was filed November 27, 1936, and on December 10, 1935, denied. The date upon which the application for appeal is presented is January 15, 1937.

Appellants by their amended complaint, filed in the Superior Court of the State of Washington, for Thurston County, set forth that they were engaged in constructing the Grand Coulee Dam pursuant to a contract dated July 16, 1934, between the United States of America, party of the one part, and appellants as parties of the other part, whereby appellants had agreed to furnish labor and materials and to perform work required for the construction of a portion of the Grand Coulee Dam and power plant on the Columbia Basin project. Appellants by their complaint further set forth that they were each and all non-residents of the State of Washington and were within the State of Washington solely for the purpose of the performance of their contract, and further set forth that the contract was being performed wholly upon land acquired by the United States Government with the consent of the State of Washington, jurisdiction over which had been ceded to the United States by the said State.

By their said amended complaint appellants alleged that the levy of the occupation tax by the State of Washington for the privilege of performing their contract with the United States Government and based in amount upon a percentage of the gross contract price is a direct interference by the State with the United States Government.

By their said amended complaint appellants specially set up and claimed that the Occupation Tax Act of the State of Washington was invalid on the ground of its being repugnant to the Constitution of the United States of America because levied upon an occupation carried on upon lands jurisdiction over which had been ceded to the United States by the State of Washington, and that therefore the said Act was a violation of Section 10 of Article 1 of the Constitution of the United States, and of the Fourteenth Amendment thereto, and of Clause 17 of Section 8 of Article 1 of the said Constitution, and further that the said Act was invalid as repugnant to matters inherent and instinct in the Constitution of the United States.

The prayer of appellants' complaint was for an injunction restraining the enforcement as against them of the Occupation Tax Act of the State of Washington.

The decision of the Superior Court of the State of Washington, for Thurston County, was against appellants' contentions and in favor of the validity of said Act, and resulted in a decree denying any relief to appellants and dismissing their complaint. Upon appeal to the Supreme Court of the State of Washington the same matters were relied upon as in the trial court and the protection of the Constitution of the United States and of its several provisions were specially set up and relied upon, both in appellants' opening brief, in their reply brief, in their petition for rehearing and in their supplemental petition thereto.

There is appended hereto, marked Exhibit "A," a copy of the opinion in Cause No. 26059 in the Supreme Court of

the State of Washington, entitled Silas Mason Company, Inc., Walsh Construction Company, Guy F. Atkinson, George H. Atkinson, William E. Kier, and Elmer L. Kier, co-partners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company, Appellants, *v.* The State Tax Commission *et al.*, Respondents, and there is appended hereto, marked Exhibit "B", a copy of the opinion in Cause No. 26060 in the Supreme Court of the State of Washington, entitled David H. Ryan, Appellant, *v.* The State of Washington, Respondent, David H. Ryan, Appellant, *v.* The State Tax Commission, Respondent.

It is believed that the following cases sustain the jurisdiction of this Court in the circumstances:

Panhandle Oil Co. v. *Knox,* 277 U. S., 218.
Northwestern Ins. Co. v. *Wisconsin,* 275 U. S., 136.
Gillespie v. *Oklahoma,* 257 U. S., 501.
McCulloch v. *Maryland,* 4 Wheat., 316.
Ft. Leavenworth R. R. Co. v. *Lowe,* 114 U. S., 525.
Surplus Trading Co. v. *Cook,* 281 U. S., 647.

B. H. KIZER,
ARNOLD L. GRAVES,
Counsel for Appellants.

GRAVES, KIZER & GRAVES,
Of Counsel for Appellants.

EXHIBIT "A".

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 26059. En Banc.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, Guy F. Atkinson, George H. Atkinson, William E. Kier, and Elmer L. Kier, Co-partners as Atkinson-Kier Company. and Mason-Walsh-Atkinson-Kier Company, *Appellants,*

v.

THE STATE TAX COMMISSION et al., *Respondents.*

(Filed Oct. 28, 1936.)

The question in this case is the power of the State of Washington to exact its occupation tax from the appellants in respect of the compensation received by them from the Federal government for the construction of the Grand Coulee dam and power plant. The case is here on appeal from a judgment of the superior court denying injunctive relief against threatened proceedings by the respondents, members of the State Tax Commission, to enforce collection of the tax.

By contract, made September 17, 1934, with the United States, acting through the Bureau of Reclamation, the appellants, other than the Mason-Walsh-Atkinson-Kier Company, for a lump sum of approximately twenty-nine million dollars, engaged to construct the dam and power plant in accordance with plans and specifications therefor embodied in the contract by reference. The contract was awarded to the appellants upon competitive bids and after public notice of a call for tenders. The appellant Mason-Walsh-Atkinson-Kier Company was not a party to the contract but was formed by the contractors to have immediate charge of the work as their agent and representative in fulfilling the contract.

The appellants, both corporate and individual, are nonresidents of the State, and their sole business in the State

is the prosecution of the work required by their contract.

As necessarily incidental to the prosecution of the contract, they conduct stores, mess-houses, and other commercial activities at the dam site for the convenience of the great number of employees engaged and their families, as well as all others of the public who have occasion to visit the works. As to these collateral activities, they are conforming to the State laws and paying such license, sales, and other taxes as are required by the State.

The challenged occupation tax is sought to be assessed against the appellants pursuant to chapter 191, Laws of 1933, p. 869 *et seq.*, as amended by chapter 57, Laws of 1933, Ex. Ses., p. 157 *et seq.*, providing:

> "From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business not specifically taxable under section 2 of this act, an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *"
> Laws of 1933, Ex. Ses., p. 157, § 1.

It was held in Rainier National Park Co. *v.* Henneford, 182 Wash. 159, 45 P. (2d) 617, that while the tax imposed by chapter 191 is an excise and not a property tax, it is in no sense a license tax and is not imposed as a prerequisite to entering into, or for the regulation of, business, but solely for revenue purposes.

The appellants contend that they are engaged in the work required by their contract as an instrumentality of the government of the United States, and as such, are immune from the occupation tax. The appellants also contend that their operations are conducted in territory exclusively occupied by the Federal government under cession of jurisdiction by the state, and that, by reason of this fact, the

state laws are inoperative upon them. While reserving this second objection to the tax, the point is not argued in the appellants' briefs. However, the question is urged in a companion case and disposed of adversely to the appellants' contention. Ryan *v.* State, — Wash. Dec. —.

It is unnecessary to set out in any detail the provisions of the contract and specifications. It is enough to say, insofar as the fact is material, that while, under its terms, the Federal Government reserves a large measure of supervisory control for the purpose of insuring proper standards of material and workmanship and a compliance with the policy of the government in respect of the conditions of labor, the appellants are independent contractors.

The principle upon which the immunity of Federal instrumentalities and agencies from state taxation rests is stated in Railroad Co. *v.* Peniston, 85 U. S. (18 Wall.) 5, where, after referring to the rule often declared by that court that the taxing power of the state is one of its attributes of sovereignty, indispensable to its continued existence and not dependent upon the constitution of the United States or derived from that instrument, it is said:

> "There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National government is legitimately exercised within the States. While it is true *that* government cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government."

In Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, it is said that just what instrumentalities of either a state or the Federal government are exempt from taxation by the other, cannot be stated in terms of uniform application. Admit-

tedly, those instrumentalities through which either government immediately and directly exercises its sovereign powers are immune from taxation by the other, and the court refers to illustrative instances in which the claim of immunity was upheld because the instrumentalities taxed were all so intimately connected with the necessary functions of government as to fall within the established exemption.

> "When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. Thomson *v.* Pacific Railroad, 9 Wall. 579; Railroad Co. *v.* Peniston, 18 Wall. 5; Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375; Gromer *v.* Standard Dredging Co., 224 U. S. 362, 371; Fidelity & Deposit Co. *v.* Pennsylvania, 240 U. S. 319; Choctaw, O. & G. R. R. Co. *v.* Mackay, 256 U. S. 531.
>
> "As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operations. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. McCulloch *v.* Maryland (4 Wheat. 316), *supra;* Collector *v.* Day (11 Wall. 113), *supra;* Dobbins *v.* Commissioners of Erie County (16 Pet. 435), *supra.* * * *

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its power. Hence the limitation upon the taxing powers of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (South Carolina *v.* United States, 199 U. S. 437, 461; Flint *v.* Stone Tracy Co., *supra* (220 U. S. 107), at 172,) or the appropriate exercise of the functions of the government affected by it. Railroad Co. *v.* Peniston, *supra,* 31." Metcalf & Eddy *v.* Mitchell, *supra.*

In that case, consulting engineers had been employed to advise states or their subdivisions with reference to proposed water supply and sewage disposal systems. They claimed exemption from the Federal income tax upon the portion of their net income earned through this public employment. Adverting to the principle that any taxation by one government of the salary of an officer or the public securities or an agency created and controlled by the other, is prohibited, the court continues:

"But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way."

In Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375, where it was held that a state might tax the interest

of a corporation in a dry dock which the United States had the right to use under a contract with the corporation, the court said:

> "It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In Fidelity & Deposit Co. *v.* Pennsylvania, 240 U. S. 319, a state tax on premiums collected by bonding insurance companies on surety bonds required of United States officials was held valid. It is said: "But mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control."

General Construction Co. *v.* Fisher, 149 Ore. 84, 39 P. (2d) 358, 97 A. L. R. 1252, decided in December, 1934, is a case similar in its features to the present one. There, as here, a foreign corporation, qualified to do business in the state of Oregon, entered into a contract with the Federal government to furnish labor and material for the construction of the Owyhee dam and irrigation works in connection with the Owyhee irrigation project in Eastern Oregon. The work was done through the Department of the Interior, and the only net income received by the contractor from its operations in Oregon for the period involved was derived from the contracts with the United States government. The Oregon state tax commission exacted, from the plaintiff, large sums levied upon its income from its operations during several years. The taxes were paid under protest and to prevent levy being made on certain machinery and equipment necessarily used by the contractor in performing its contract with the United States government. Suit was brought to recover the amount of taxes so paid, the complaint alleging, as one of the grounds of attack upon the tax, that it was an unwarranted burden upon the functions of the Federal government. The trial court sustained a demurrer to the complaint, and a judgment was entered dis-

missing the action. On appeal to the supreme court of Oregon, the judgment of the trial court was affirmed.

The court held that when the construction company, as an independent contractor, entered into a contract to perform labor for, and furnish material, to the Federal government, it did not thereby become a part, or an instrumentality, of the United States, and its property, and its rights to conduct business within the state were not immune from taxation by the state wherein it was located in performing its contract, citing Thompson *v.* Union Pacific Ry. Co., 76 U. S. (9 Wall.) 579, 19 L. Ed. 792; Baltimore Shipbuilding & Dry Dock Co. *v.* Baltimore, 195 U. S. 375, 25 S. Ct. 50; Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 46 S. Ct. 172; Gromer *v.* Standard Dredging Co., 224 U. S. 362, 32 S. Ct. 499. Continuing:

> "* * * the property of plaintiff within the state of Oregon was subject to taxation by the state even though used in performing a contract with the federal government. The property thus being taxable, the privilege of using it for such purposes, based on the net income derived from its use is also taxable, whether called a property tax, a privilege tax, or an income tax. In the final analysis it all amounts to the same thing. It was the property of plaintiff that plaintiff alleges was to be taken for the tax.
>
> "The principle of immunity from state or local taxation of the property and instrumentalities of the United States is generally based upon the direct ownership, or use and control of the property by the United States. Such immunity does not extend to the property of an independent contractor for gain even should it be used in carrying out a contract with the United States. The same principle obtains regarding taxation by the United States of incomes derived by persons and corporations from the state; Metcalf *v.* Mitchell, *supra.*"

Commenting on the contention made that the imposition of a tax tended to hamper and delay the Federal government in carrying out its contracts, the court said:

> "Every tax levied has some remote tendency to interfere with the contractual relations between parties, but

that is no reason why such parties should not contribute their just proportion to the expenses of maintaining the government from which they demand protection for their property and privileges. In the instant case the work performed by plaintiff was undoubtedly let to the lowest responsible bidder. We cannot see how the tax complained of in any way impaired said contract or hindered the federal government in its governmental functions."

An appeal from the decision in that case to the supreme court of the United States was dismissed (General Const. Co. *v.* Fisher, 295 U. S. 715, 55 S. Ct. 646) upon the authority of Trinityfarm Const. Co. *v.* Grosjean, 291 U. S. 466, 54 S. Ct. 469; Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 46 S. Ct. 172; Lucas *v.* Howard, 280 U. S. 526, 50 S. Ct. 87; Lucas *v.* Reed, 281 U. S. 699, 50 S. Ct. 352; Alward *v.* Johnson, 282 U. S. 509, 514, 51 S. Ct. 273; Willcuts *v.* Bunn, 282 U. S. 216, 224, *et seq.;* 51 S. Ct. 125; and Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375, 382, 25 S. Ct. 50.

In Six Cos. *v.* DeVinney, 2 F. Supp. 693, the plaintiff, contractor on Boulder dam and power plant, sought to enjoin the collection of taxes levied by the state of Nevada upon its personal property and poll taxes alleged to be due from its employees, claiming to be an instrumentality of the United States and, as such, not subject to the revenue laws of the state. Holding against the plaintiff's contention, Norcross, district judge, said:

"The case of a corporation contractor for the construction of public works is one in which, if it may be said to be an instrumentality of the government, its relations to the government are nevertheless purely contractual. It does not exercise governmental functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying. In the case of Clallam County *v.* United States, 263

U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328, the court held that 'the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war,' and said: 'This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account.' "

In the case before us, while it is a fact that the appellants are, for the time, performing no work within the State other than that covered by their contract with the Federal government, they are in no sense creatures of the government, nor brought in by the government especially for the work. The parties to the contract are general contractors engaged in contracting throughout the United States, and the two corporate contractors have qualified themselves to do business in the State of Washington.

In State *v.* Wiles, 116 Wash. 387, 199 Pac. 749, Wiles had entered into a written contract with the United States government whereby he agreed to carry the United States mail in the city of Seattle between the various depots, wharves, docks, postoffice, and substations, and for the purposes of the contract, he used motor trucks. He was required to provide vehicles for the carriage of the mail and to keep them properly equipped and repaired. Under the contract, the trucks were to be used only in the business of carrying the United States mail. Refusing to obtain a license authorizing the operation of his trucks, he was convicted of operating trucks upon the highways of King County without a license, as required by the State laws. On his appeal to this court, the appellant contended that he was an instrumentality selected by the government in the performance of its governmental functions and, as such, was immune from the obligation to obtain and pay for a license; that since he was doing for the government what it might do for itself to impose a tax upon him would be in effect to impose it upon the government, because any private person carrying mail would necessarily require the government to pay him an additional amount equal to the

tax. Commenting on this contention and the authorities urged in support of it, the court said:

> "Here there is no effort to tax the business of carrying the mail. The appellant is not a direct instrumentality of the government; he is a personal contractor, doing certain work for the government, at a fixed compensation. In no sense is he the representative or agent of the government nor an integral part of it * * *
>
> "A person building a state road is nothing but a contractor; he is no part of the state or its agencies, and does not thereby inherit the various immunities of the state. There is nothing in appellant's contract which indicates that the government intended to pass its immunities on to him. Under these circumstances it should be presumed that it was the intention that he should be subject to the general laws of the state."

Deducing the rule from the authorities cited, we said:

> "While it is true, generally speaking, that a state may not by its laws hamper and interfere with the free and orderly performance of governmental functions, by taxation or otherwise, yet that interference must be substantial and direct. Every indirect and immaterial interference with the conduct of government business is not violative of the principles upon which the Federal government is founded and performs its duties. The rule of reason must control in all such questions, otherwise the states will be greatly hampered in the conduct of their affairs, without any correspondent benefit flowing to the national government."

The appellants cited Panhandle Oil Co. *v.* Mississippi *ex rel.* Knox, 277 U. S. 218, 48 S. Ct. 451, 46 A. L. R. 583, and Graves *v.* Texas Co., 56 S. Ct. 818. These cases involve a tax on the sale of gasoline to the United States and are alike in principle. In the latter case, the State of Alabama levied an excise tax of six cents a gallon upon storers of gasoline, accruing at the time of withdrawal from storage. This tax was challenged by corporations storing and selling to the United States large quantities of gasoline required by it for its governmental uses, and delivered pursuant to written

contract. There was some contention that the law was one taxing mere storage and not sale, and, as such, was properly taxable by the state. The court was of the opinion that storing alone was not intended to be taxed, but, assuming that by the acts under consideration, the state meant to tax mere storing, the court held that that purpose could not be given effect in respect of the company's sales and deliveries to the United States, without infringing the constitutional principle which safeguarded the Federal government against state taxes.

> "Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat 'a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing.' Brown *v.* Maryland, 21 Wheat. 419, 444, 6 L. Ed. 678. As held in the Panhandle case (277 U. S. 218, at page 222, 48 S. Ct. 451, 452, 72 L. Ed. 857, 56 A. L. R. 583): 'A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons.' So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawal so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional."

In our opinion, there is a vital distinction between the Graves and the Panhandle Oil Co. cases and the present case. There, the tax of so many cents per gallon was exacted upon every gallon that left the storage for delivery to the United States. The tax was on the sale to the government and was direct and immediate. Here, the occupation

tax is but one of numerous incidental expenses necessarily inhering in the qualification of the contractors to perform the work for the government

The case of Trinityfarm Construction Co. *v.* Grosjean, 291 U. S. 466, involved a tax of five cents per gallon levied upon gasoline by the state of Louisiana. A contractor with the Federal government for the construction of levees in Louisiana, to control the waters of the Mississippi river, challenged the right of that state to exact the gallonage tax on gasoline purchased and used by the contractor in performing its contract with the Federal government. In upholding the tax, the court said:

> "The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi River, and to authorize the performance of the work directly by government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor. The exaction in respect of its relation to the Federal undertaking is wholly unlike those considered in Choctaw, O. & G. R. Co. *v.* Harrison, 235 U. S. 292; Indian Oil Co. *v.* Oklahoma, 240 U. S. 522; and Gillespie *v.* Oklahoma, 257 U. S. 501. Appellant is an independent contractor. Casement *v.* Brown, 148 U. S. 615, 622. It is not a government instrumentality. Cf. Metcalf & Eddy *v.* Mitchell, 269 U. S. 514. Group No. 1 Oil Corp. *v.* Bass, 283 U. S. 279. Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate

> power. If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. Thomas *v.* Gay, 169 U. S. 264, 275. Metcalf & Eddy *v.* Mitchell, *supra*, 524 *et seq.* Wheeler Lumber Co. *v.* United States, 281 U. S. 572, 579. Appellant's claim of immunity is without foundation."

This case, contrasted with Graves *v.* Texas Co., and the Panhandle Oil Co. case, illustrates, we think, the distinction in principle involved. In the Graves case, the tax was laid upon the direct sale to the government. In the Trinityfarm Construction Co. case, a like tax was paid by the contractor, but the sale was not made directly, or in effect, to the Federal government. It was argued that the tax inhered in the cost of the work performed by the contractor, and, therefore, affected the governmental operations as effectively as if the gasoline had been actually sold to the government. But the court brushed this contention aside by saying that the tax was not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the Federal government was a party or in which it was immediately or directly concerned.

And so, in the present case, the means chosen by the government for building the dam and power plant was by contract, rather than the doing of the work directly by its own officers or agencies.

In Weston *v.* City Council of Charleston, II Peters 449, the city of Charleston had levied a tax on "six and seven per cent. stock of the United States." In holding the tax void as an unauthorized imposition upon an instrumentality of the Federal government, Chief Justice Marshall used this language:

> "It is admitted by the counsel for the defendants that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

"The distinction is, we think, apparent. When lands are sold, no connexion remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connexion between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government stands, we think, on very different principles from a tax on lands which the government has sold. • • •

"The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

We have here an early recognition of the distinction we are making between the cases of Graves *v.* Texas Co., *supra*, and Trinityfarm Construction Co. *v.* Grossjean, *supra*. The tax was on the contract to repay money borrowed. After the borrowed money was repaid to the lender, the government was no longer concerned or affected. Here, the government, by its contract, agreed to pay the contractors a lump sum for the rendition of specified services. When the money is earned and paid to the contractor and becomes a part of his gross earnings, the Federal government is no longer concerned with what he may be required to pay as a tax upon the privilege of doing business in this state, no more so than it was concerned in the amount of the tax paid upon gasoline, by the contractor, in building the Mississippi river levees.

In Railroad Co. *v.* Peniston, 85 U. S. 5, *supra*, the Union Pacific Railway, a corporation chartered by Congress, sought, by reason of the source of its incorporation and certain services agreed to be rendered to the government of the United States, to avoid taxes levied upon its property

by one of the counties of the state of Nebraska. The court, in upholding the tax, pointed out that, as it was levied on the property of the railroad only, it did not affect its capacity to render whatever governmental services it owed the government. In a dissenting opinion, Justice Bradley, after contending that the rule established in McCulloch *v.* Maryland, 4 Wheat. 316, and other cases following it, should be applied, makes this significant concession to the prevailing opinion:

> "The case differs *toto coelo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards his State is of no consequence to the government, so long as his contract, and its execution are not interfered with. In that case the contract is the means employed for carrying into execution the powers of the government, and the contract alone, and not the contractor, is exempt from taxation or other interference by the State government."

Our conclusion is that the trial court correctly held appellants liable for payment of the challenged tax, and its judgment denying injunctive relief is, accordingly, affirmed.

GERAGHTY, *J.*

We concur:

MILLARD, *C. J.*
MAIN, *J.*
MITCHELL, *J.*
TOLMAN, *J*
HOLCOMB, *J.*
BEALS, *J.*
BLAKE, *J.*
STEINERT, *J.*

EXHIBIT "B".

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26060. En Banc.

DAVID H. RYAN, *Appellant,*

v.

THE STATE OF WASHINGTON, *Respondent.*

DAVID H. RYAN, *Appellant,*

v.

THE STATE OF WASHINGTON, *Respondent.*

(Filed October 28th, 1936.)

Plaintiff brought these two actions seeking (1) the refund of an amount exacted from, and paid by, him as an occupation tax and (2) an injunction to prevent the imposition against him of a subsequent tax of the same kind. Trial before the court, without a jury, resulted in a dismissal of both actions. Plaintiff has appealed.

The taxes imposed by the state in the first case were based upon the total amount of sales of merchandise made by appellant and also upon the total amount of gross income received by him in the performance of a Federal government contract, all such sales and operations having been made and conducted within the area comprised in what is known as the Columbia basin project. The tax sought to be enjoined in the second case was based upon the total amount of gross income received by appellant in the performance of a second, and subsequent, Federal government contract operating within the same area. The principal question in the first case, and the only question in the second, is whether the state of Washington had any jurisdiction *within* the territory of the project, sufficient to permit the state to impose and collect an occupation tax for

services rendered therein by appellant to the Federal Government.

A brief history of the Columbia basin project will be of aid to a clearer understanding of the problem involved.

For a number of years, the people of this State have been actively interested in the development of the Columbia River and its tributaries. Between 1918 and 1932, many surveys and reports were made by engineers employed either by the state or else by the bureau of reclamation or the war department of the United States. These surveys and reports had relation to navigation, the development of hydro-electric power, and the reclamation of arid lands by irrigation. The state and its people were directly and particularly interested in, and concerned with, the features of power and reclamation. In 1932, the chief of engineers of the United States Army, after an exhaustive investigation, recommended a comprehensive plan for the improvement and development of the Columbia River for the purposes of navigation, flood control, power and irrigation. The plan contemplated the ultimate construction of ten dams in the Columbia River, the first of which, together with a power plant, was to be erected at the head of Grand Coulee.

In 1933, the state legislature created the Columbia Basin Commission, consisting of five members, and authorized them to enter into contracts and to employ any and all means necessary to secure the immediate development of the Columbia basin project by means of the proposed Grand Coulee dam and the orderly development of the power, water and soil resources incident thereto (Chapter 81, Laws of 1933, p. 376, Rem. Rev. Stat. (Supp.) § 3017-1 (P. C., § 5724-26) *et seq.*

During this period of preparatory activities, the Grand Coulee dam and power plant had an indeterminate status, owing to the uncertainty as to whether the project would be a state or a Federal project. It seems that originally it was contemplated that the Columbia Basin Commission should at least carry on the necessary preliminary engineering. For that purpose, the Columbia basin commission obtained from the state emergency relief commission an allocation of $377,000 of emergency relief funds. This had

the effect of tying in the project with the matter of emergency relief work, which was seriously engaging the attention of this, and of other States, at that time.

On June 30, 1933, the Columbia basin commission, in pursuance of its plan, entered into a contract with the United States, represented by the bureau of reclamation, department of the interior, wherein the United States agreed to make the topographic surveys and explorative work and to prepare the designs and specifications for construction work on the dam, for which the Columbia Basin Commission agreed to pay an initial sum of $50,000 at the time of the execution of the contract and the balance of the allocation of $377,000 as the work progressed. It appears that, during the period with which we are here concerned, the greater part of the $377,000 was paid as agreed.

It soon became apparent, however, that the work of construction itself would be of such magnitude and the expense so great that its completion would require the intervention of no less an agency than the Federal government itself, with the unlimited financial resources at its command. Consequently, steps were taken to have the Grand Coulee dam and power plant included in the Federal public works program. After considerable effort, this was accomplished, and an allocation of sixty-three million dollars for the dam and power plant was made by the Federal bureau commonly known as NIRA.

On November 1, 1933, the United States, represented by the Secretary of the Interior, and pursuant to the reclamation laws and the National Industrial Recovery Act, and the state of Washington, acting through the Columbia basin commission, entered into a contract relating to the construction of the dam, power plant and power transmission lines at the Grand Coulee site, under the comprehensive plan above mentioned.

Some of the provisions of that contract are of particular interest in this controversy. The contract began with a series of ten recitals. No. 1 referred to the fact that the allotment of sixty-three million dollars, appropriated by NIRA, had been made available for the *construction* of the dam and power plant. No. 9 recited that the increased

amount of firm power made possible at the lower dams by reason of the storage behind the Grand Coulee dam was an important factor in making the lower dams self-liquidating. No. 10 referred to the fact that the Columbia basin commission had been created by the state legislature for the purpose of co-operating with the Federal government in *securing the construction* of the project and of the Grand Coulee dam.

The contract then set forth the articles of agreement by number. The first, which is numbered article 11, provided for the expenditure by the United States of sixty-three million dollars, or so much thereof as was found necessary, in the *construction* of a dam and power plant at Grand Coulee site. Article 12 provided that the United States should retain title to the dam and power plant until the cost of the project had been fully repaid into the treasury of the United States. Article 13 reads as follows:

> "13. Commission to Act in Advisory Capacity.—The Commission will act as an advisory board representing the state in an advisory capacity in conferences with officers of the United States *concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines.*" (Italics ours.)

Then followed a number of provisions giving the State an option, for a period of eight and one-half years after the date of the contract, to purchase the perpetual right to the entire output of the dam and power plant, upon the conditions set forth in detail therein. Article 24 reads as follows:

> "24. Rules and Regulations by Secretary.—The Secretary shall have the right to adopt and promulgate rules and regulations for the administration of the said project and the right to determine and decide all questions arising in connection with or growing out of the construction or operation and maintenance of said proposed dam, power plants and transmission lines *and which are not expressly determined by law* or the

terms of this contract, and his decisions on such questions shall be conclusive." (Italics ours.)

At this point, appellant's first connection with the project appears. On November 29, 1933, appellant, a resident of San Diego, California, entered into a contract with the United States for the excavation of overburden at Columbia River dam site, Columbia basin project, "Washington," for the sum of $534,500. The specifications attached to and made a part of the contract, provided, among other things, that the appellant should obtain all required licenses and permits, should give preference, after ex-service men, to citizens who were residents of the county and *state in which the work was to be performed,* should furnish compensation insurance in compliance with the laws of the *state wherein the work was to be done,* and should comply with all applicable provisions of Federal, *state, and municipal* safety laws and building and construction codes.

Appellant entered upon the execution of the work under the contract about January 1, 1934, and completed it in the summer of the same year. During the entire performance of the work, appellant maintained his office and living quarters within the territory of the project as hereinafter designated.

After the completion of that contract, appellant, on July 18, 1934, entered into a second contract with the United States, which was for the construction of a railroad at Grand Coulee dam, Columbia basin project, "Washington," for the sum of $235,570. The railroad was to be 34.5 track miles in length, extending from the Northern Pacific Railway tracks at Odair, Washington, to the dam site. The specifications in this contract contained the same provisions as those to which we have specifically referred above. The actual residence of appellant, for about one-half of the time during which the second contract was being performed, was at Coulee City, which is outside of the territory of the project, and for the remainder of the time was at the dam site, on government land which had been obtained in the manner hereinafter described.

On July 16, 1934, which was two days before the execution of appellant's second contract, the United States en-

tered into a contract with Silas Mason Company, Inc., and others for construction work on Grand Coulee dam and power plant, Columbia basin project, "Washington," for the sum of $29,339,301.50. The last mentioned contract contemplated work on a gigantic scale, as is indicated by the figures just given. That contract, however, did not include the work to be done by appellant under either of his contracts.

We make reference, at this time, to the contract of Silas Mason Company, Inc., for the reason that out of it grew an action similar to the two involved here. Silas Mason Co. *v.* State Tax Commission, ante p. 60, — P. (2)d —. That action and these two were tried in the superior court at the same time and, by stipulation of the parties, all the evidence, in so far as it was material, was considered as applying to all three cases. The respective appeals were argued in this court on the same day, upon records containing identical statements of facts.

The specifications attached to the contract of Silas Mason Company, Inc., provided, among other things, and in addition to what has already been mentioned, that the contractor should make all necessary arrangements with the proper *state and county authorities* for school facilities, and that police protection for the contractor's camp and the area involved in and surrounding the construction work would be furnished by the Washington State patrol in cooperation with the Federal government, but that the contractor should provide, at its camp site, such jail facilities as were satisfactory to the Washington State patrol.

The area included in the entire project above mentioned does not specifically and satisfactorily appear from the record, and we are unable to say exactly how much land is included therein. It does appear, however, that the area is very extensive, covering many acres of land on both sides of the Columbia River and including a railroad right of way 34.5 miles in length. There are two important things, however, to be noted in this connection. The first is that, during the time that the construction work was in progress, the United States, through condemnation proceedings brought against a number of individuals and corporations,

acquired possession of, and title to, the various tracts of land now within the area of the project. A transcript of one of such condemnation proceedings, stipulated to be similar in form to all the others, is made a part of the record herein. It shows that the title to that particular tract was acquired by the United States on or after May 14, 1934, which was *after* appellant had commenced work. The other important factor to be noted is that, included in the area of the project, are school lands of the State and also tribal lands, all of which have been taken over by the Federal government and now form a part of the project.

At the seventy-fourth session of the United States Congress, an act was passed authorizing the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes. The act ratified and validated all contracts and agreements that had been theretofore executed in connection with the Grand Coulee dam project H. R. 6732, Public Act 409. The work contemplated to be done upon the project by the United States was not in furtherance of any war measure or for the national defense, but simply for the improvement of navigation and for industrial recovery.

During the period of the construction work under his first contract, appellant maintained warehouses on ground within the project and at the dam site, where he stored and sold gasoline, oil, tires and automobile accessories. Appellant paid the State a tax on these sales, the recovery of which forms a part of the basis of his first action.

At its regular session of 1933, the legislature of this State passed an act commonly known as the occupation tax act, chapter 191, Laws of 1933, p. 869 *et seq.* The act related to certain business activities "within this State." At its special session of 1933, the legislature amended the former act in certain respects. Chapter 57, Laws of 1933, Ex. Ses., p. 157, *et seq.* That act likewise applied to business activities "within this State." The latter act became effective January 18, 1934, which was shortly after appellant's first contract had been entered into, but before it was performed.

These two actions are in resistance to the application of either of these legislative acts to appellant's activities.

Appellant's first contention is that his construction or excavation contracts constituted sales of services, within the provisions of chapter 191, and that by § 5, p. 879, of that act, read in connection with § 2 (2) (f), p. 875, the proceeds of his contracts were exempt from the tax.

The answer to this contention is that the tax was not imposed under chapter 191 as it originally stood, but under chapter 57, p. 157, § 1 (designated as § 2-a) (1), which clearly covers business activities of the kind engaged in by appellant, if "within this State." This contention of appellant is but briefly discussed by either counsel and, we think, merits nothing further than what we have already said.

The principal, and only remaining, question in the case is whether appellant's activities took place "within this State." Specifically stated, the contention of appellant is that by virtue of the United States constitution and the statutes of this State, the area contained within the project upon which the excavation and construction work was performed is under the exclusive jurisdiction of the United States; and that, therefore, any tax legislation of the State is wholly inoperative within the area of the project or upon any activities of appellant therein. Quotation of the specific constitutional and statutory provisions involved will first be made.

(1) Art. I, § 8, clause 17 of the Constitution of the United States provides that Congress shall have power:

> "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, *and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;* * * *" (Italics ours.)

Our reference to, and discussion of, this constitutional provision relate only to the latter, or italicized, portion of the quotation.

Rem. Rev. Stat., § 8108 (P. C. § 7110), adopted in 1891, provides that:

> "The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, * * * the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

It will be observed that the statute, while somewhat broader than Art. I, § 8, clause 17, in its designation of

structures and purposes, nevertheless specifically recites that the consent therein given is in accordance with the constitutional provision.

The provision of Art. I, § 8, clause 17, as above quoted and italicized, has been frequently construed by the United States Supreme Court, and it is now definitely settled and accepted that there are two ways in which lands within the jurisdiction of the State may become subject to the exclusive jurisdiction of the United States: (1) By purchase by the United States for certain specified purposes, with the consent of the State, and (2) cession of exclusive jurisdiction to the United States by the State. Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; United States *v.* Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761; Surplus Trading Co. *v.* Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091; Standard Oil Co. *v.* California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775.

From these cases, the following rules are deducible respecting jurisdiction over lands acquired by the United States for public uses: (1) When the land is acquired for one of the purposes within Art. I, § 8, clause 17, by purchase with consent of the State, Federal jurisdiction is exclusive in such area for all purposes; (2) when the land is acquired for one of the purposes within that clause, but other than by purchase with the consent of the State, then Federal jurisdiction is exclusive only to the extent of the purposes for which the land is held; (3) when the land is acquired for a purpose not within that clause, but by purchase with the consent of the State, then the United States has such jurisdiction over the land as may be ceded to it by the State; and (4) when the land is acquired for a purpose not within that clause, in any manner other than by purchase with the consent of the State, then the United States holds the land just as any other proprietor does, except that the land may not be taxed by the State. Our ultimate problem herein will be to determine under which one or more, if any, of these classifications, the present case falls.

Manifestly, the construction work involved in this case does not come within any of the uses implied in the descrip-

tive terms of the constitutional provision, unless it can be said to come within the term "other needful buildings." If the case were one of first impression, the rule *ejusdem generis* would, in our opinion, exclude such work from the classification of "needful buildings," because the particular work was in no way connected with, or related to, forts, magazines, arsenals or dockyards.

However, by judicial interpretation, over a long period of years, the term "needful buildings" has been applied to the following: a navy yard (Western Union Tel. Co. *v.* Chiles, 214 U. S. 274, 29 S. Ct. 613, 53 L. Ed. 994); a military hospital (Arlington Hotel Co. *v.* Fant, 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447); a military reservation (United States *v.* Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761); an army training and mobilization station (Surplus Trading Co. *v.* Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091); a customs house (Sharon *v.* Hill, 24 Fed. 726); locks and dams (United States *v.* Tucker, 122 Fed. 518); a post office (United States *v.* Andem, 158 Fed. 996); a penitentiary (Steele *v.* Halligan, 229 Fed. 1011); an Indian training school (United States *v.* Wurtzbarger, 276 Fed. 753); a military cemetery (Wills *v.* State, 50 Tenn. 141); a soldiers' home (Sinks *v.* Reese, 19 Ohio 306); a courthouse (State ex rel. Jones *v.* Mack, 23 Nev. 359, 47 Pac. 763, 62 Am. St. 811).

While the structures mentioned in the foregoing cases are not specifically named in, and do not strictly fall within, the constitutional classification, it is, nevertheless, apparent that the particular structures or "buildings" in those cases, with the possible exception of one, are such as would necessarily require absolute and exclusive jurisdiction in the United States government, because their operation is in the discharge of a constitutional or governmental function, and there is no field for State participation or State legislation.

The only possible exception in the list is the instance of locks and dams, involved in the Tucker case. But even in such case, if the locks and dams were owned and operated by the United States solely for the purpose of facilitating navigation, as they concededly were in that case, their func-

tion would likewise be a constitutional or governmental function. But irrigation, flood control, and power development (except in so far as the latter two are intended to promote navigation or else some war measure or the national defense), while they may be of national interest and serve a public purpose, are not functions enjoined upon the Federal Government by the Constitution, nor are they delegated to the United States by the Constitution, nor is it necessary that they be committed, for their operation, to the exclusive jurisdiction of the United States Government. Legislative power, with reference to such things, is reserved in the State.

Turning, now, to the statute above quoted, we note that the State has given its consent to the acquisition, by purchase or condemnation on the part of the United States, of lands for sites of locks, dams, etc., as well as for the purposes set forth in the constitutional provision. For present purposes, it may be conceded that the term "needful buildings" is broad enough, under the construction given to that term by the Federal courts, to include locks and dams. It is very probable that that specific mention of locks and dams was made in the statute in order to remove any doubt that may have existed generally at, and prior to, the time of the decision in the Tucker case, with respect to the inclusive intent of the constitutional provision.

The point that we make and stress here, and upon which we rest our ultimate conclusion herein, is that, while the statute conferred consent upon the United States to acquire land within the territory of the State, the State's power to cede jurisdiction is limited by the statute to those instances where it clearly appears that the land is to be used by the United States for a constitutional or governmental purpose. As stated in the leading case upon the subject, Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264, *supra:*

> "The essence of that provision (Art. I, § 8, clause 17, United States constitution) is that the State shall *freely* cede the particular place to the United States for one of the specific and enumerated objects." (Italics ours.)

(2) The question in this case, then, is whether, by reason of the conjunction of the constitutional provision, the statute, and the acquisition by the Federal Government of the lands within the project in the manner and for the purposes that the Government acquired them, the State has been *ipso facto* deprived of all jurisdiction with respect to such lands. However close the question may seemingly be, we are of the opinion that the State has not been deprived of all jurisdiction, but that it has a concurrent jurisdiction to the extent, among other things, that it has the right to impose a tax upon business activities conducted within the area of the project. The reason for this conclusion is based upon what we conceive to be fundamental principles of law and the conductive facts of this case.

By the enabling act of Congress, passed February 22, 1889, the territory of Washington became the State of Washington. Subject to the limitations and restraints of the Federal constitution, the State, as such, has all the sovereign powers of independent nations over all persons and things within its territorial limits. Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; New York *v.* Miln, 11 Pet. 102, 9 L. Ed. 648; Cummings *v.* Missouri, 4 Wall. 277, 18 L. Ed. 356. The area within, and under, the jurisdiction of a State may come under the exclusive jurisdiction of the United States by purchase by the Federal government for a purpose prescribed by the Federal constitution and with the consent of the State, or by cession of exclusive jurisdiction by the State to the United States. In either event, the land acquires a territorial status and ceases to be a part of the state, either territorially or jurisdictionally. Concessions Co. *v.* Morris, 109 Wash. 46, 186 Pac. 655.

But, since self-preservation is the first law of nations and states, as well as of individuals, it will not be presumed, in the absence of clearly expressed intent, that the State has relinquished its sovereignty. Wills *v.* State, 50 Tenn. 141; *In re* Kelly, 71 Fed. 545; Ex parte Gaines, 56 Ark. 227, 19 S. W. 602; Barrett *v.* Palmer, 135 N. Y. 336, 31 N. E. 1017, 31 Am. St. 835, 17 L. R. A. 720. (Four of these cases are cited approvingly in the Concessions Co. case.)

The power of taxation is an incident of sovereignty and inherent in the State, because government cannot exist or function without it. It is a legislative power following the more general power to make laws. State *ex rel.* Board of Commissioners *v.* Clausen, 95 Wash. 214, 163 Pac. 744. The power of taxation is never to be suspended, surrendered, or contracted away. Amendment XIV, Washington constitution. In the absence of constitutional restraint, the power of the legislature over taxation is as unlimited as the subject with which it deals. State *ex rel.* State Tax Commission *v.* Redd, 166 Wash. 132, 6 P. (2d) 619; 26 R. C. L. 27, § 13. The taxing power of the State is never presumed to have been relinquished unless the language in which the surrender is made is clear and unmistakable. Erie R. Co. *v.* Pennsylvania, 21 Wall. 492, 22 L. Ed. 595; 1 Cooley on Taxation (4th ed.) 159, § 60.

This is not a contest between the Federal government and the State as to jurisdiction. It is a contest between the State, asserting its concurrent, or partial, jurisdiction, and an individual who asserts that exclusive jurisdiction rests in the Federal government. So far from there being any contest as to jurisdiction between the two sovereign powers, the record discloses that they are working in harmony, and accord, each exercising the field for which it is the better equipped and each, at the same time, recognizing the field of the other. The Federal government, therefore, cannot possibly be prejudiced by the result of this action.

It appears from what we have already stated that prior to, at the time of, and at all times since, the inception of the project, the United States and the State have cooperated in every way in the development and construction of the dam and power plant. The Federal government at present furnishes the money, supervises the work, and will, for a time, maintain the operation of the project. The State, on the other hand, has furnished a large amount of money for the preliminary work and now, through the Columbia Basin Commission, acts in an advisory capacity to the Federal government in the further progress of the

work. The State also has an option to take over the entire project when completed.

The Federal government is involved in a huge undertaking, the object of which is to promote navigation, develop power, and provide for irrigation. The State is likewise concerned. Navigation is a function that comes within the exclusive power of the Federal government by virtue of the Constitution of the United States. The development of irrigation and of power for industrial purposes, however, is within the reserved powers of the State. There is, thus, every reason why the Federal government and the State should cooperate, and, in order to do so, each must have proportionate jurisdiction.

> "We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts preeminently of this—a duty oftentimes of great delicacy and difficulty." South Carolina *v.* United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261.

On the other hand, if the State were excluded from all jurisdiction, the residents of the project would be without school facilities, police protection, and the right to vote, the workmen would be deprived of the benefit of industrial insurance, and the rules for sanitation would be suspended; for, if the State be wholly without jurisdiction, then it must follow that the State may not extend its privileges to the residents of the project nor expend its money in their behalf. Opinion of Justices, 42 Mass. 580; *In re* Town of Highlands, 22 N. Y. Supp. 137; Sinks *v.* Reese, 19 Ohio 306;

State *ex rel.* Lyle *v.* Willett, 117 Tenn. 334, 97 S. W. 299; Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; Surplus Trading Co. *v.* Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091.

Furthermore, so far as the record supplies us with any information, the Federal government did not acquire these lands until after the work of construction, under appellant's first contract, had been begun. Some of the lands, it appears, were not acquired until about the time the work under the contract was completed. The record discloses that, when appellant entered into the second contract, although all of the lands had then been acquired, the State was exercising its jurisdiction within the project at the instance of the Federal government itself. Moreover, it does not appear from the record that the Federal government ever set apart any definite reserve as constituting the project, but, rather, that it appropriated lands from time to time as the necessities of the project required; this fact may not be a controlling one, but is nevertheless entitled to consideration.

The facts, taken as a whole, argue conclusively, in our opinion, that the State never intended to cede, and the United States never intended to take, exclusive jurisdiction over the project. Facts consistent with the retention, and inconsistent with cession, of exclusive jurisdiction by the State should, in the absence of any assertion by the Federal government to the contrary, be construed most strongly in favor of the State, to the end that its territory be not diminished and that its jurisdiction in matters in which the Federal government is not directly or immediately concerned be not entirely lost.

We conclude, therefore, that the purposes of the project, taken as a whole, do not fall exclusively within any of the enumerated classes mentioned above, so as to give the United States exclusive jurisdiction over the land, but, rather in a class where several purposes are so intermingled as to call for the exercise of jurisdiction by both the Federal government and the State, according as their respective interests and duties require. In so far as the legis-

lative acts in question are concerned, they are operative upon the business activities of the appellant within the project.

The judgments are affirmed.

STEINERT, *J.*

We concur:

MILLARD, *C. J.*
MAIN, *J.*
MITCHELL, *J.*
TOLMAN, *J.*
HOLCOMB, *J.*
BEALE, *J.*
BLAKE, *J.*
GERAGHTY, *J.*

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The Supreme Court of the United States

October Term, 1936

No. [redacted] 7

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company,

Appellants,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON; HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, constituting the Tax Commission of the State of Washington,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANTS

B. H. KIZER,
ARNOLD L. GRAVES,
Attorneys for Appellants.

GRAVES, KIZER & GRAVES,
Of Counsel for Appellants.

Office and Postoffice Address:
1224 Old National Bank Building,
Spokane, Washington

EMPIRE PRINTING CO., SPOKANE

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The Supreme Court of the United States

October Term, 1936

No. 773

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company,

Appellants,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON; HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, constituting the Tax Commission of the State of Washington,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANTS

B. H. KIZER,
ARNOLD L. GRAVES,
Attorneys for Appellants.

GRAVES, KIZER & GRAVES,
Of Counsel for Appellants.

Office and Postoffice Address:
1224 Old National Bank Building,
Spokane, Washington

I.

THE OPINION OF THE COURTS BELOW

The opinion of the Supreme Court of the State of Washington is reported in Volume 88 Washington Decisions, p. 60, 61 Pac. (2d) 1269. The companion case of Ryan v. The State of Washington is reported in Volume 88 Washington Decisions, p. 75, 61 Pac. (2d) 1276. Copies of the opinion will be found at page 56 of the Record.

II.

JURISDICTION

1. The decree of the Supreme Court of the State of Washington was rendered October 28, 1936. (R. 56.)

2. Appellants by their amended complaint specially set up and claimed that the Occupation Tax Act of the State of Washington was invalid because repugnant to the Constitution of the United States of America, and consequently unconstitutional and void as applied to the transaction stated in the amended complaint. (R. 15, 16.) The Superior Court of the State of Washington for Thurston County ruled the Washington Occupation Tax to be a valid exercise of the taxing power of the State, and the tax levied pursuant thereto to be valid and entered its decree dismissing the action and denying the injunctive relief prayed. (R. 47, 55.) On appeal the Supreme Court of the State of Washington made the same ruling against

the same claim and affirmed the decree of the lower court. (R. 56.)

3. The jurisdiction of this Court is invoked under Judicial Code, Section 237 (a), as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Section 344 (a).

4. It is believed that the following cases sustain the jurisdiction of this Court in the circumstances:

Panhandle Oil Co. v. Knox, 277 U. S., 218;
Northwestern Ins. Co. v. Wisconsin, 275 U. S. 136;
Gillespie v. Oklahoma, 257 U. S. 501;
McCulloch v Maryland, 4 Wheat. 316;
Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525;
Surplus Trading Co. v. Cook, 281 U. S. 647.

III.

STATEMENT OF THE CASE

Appellants brought this action to enjoin the collection of the Washington Occupation Tax upon the ground that as applied to them the Act was unconstitutional. The facts have not been in dispute. The only question presented is the proper application of constitutional principles. The trial court sustained the validity of the tax and accordingly entered judgment dismissing the action. (R. 47 and 55.) On appeal the Supreme Court affirmed the decree of the trial court.

None of the appellants are residents of the State of Washington. All are in the state solely to build the Grand Coulee Dam for the United States government.

They engage in no other business within the state. Since the case turns on the nature of this undertaking and the purposes of it, something of detail is necessary.

We quote the premises and part of Article I of the contract under which appellants are working for the United States government:

> "THIS CONTRACT, entered into this 16th day of July, 1934, by THE UNITED STATES OF AMERICA * * * and Silas Mason Company, Inc., * * * ; Walsh Construction Company, * * *; and Atkinson-Kier Company, * * *:
>
> "ARTICLE I. *Statement of Work.* The contractor shall furnish labor and materials, and perform all work required for construction of Grand Coulee Dam and Power Plant, * * * for the consideration of twenty nine million three hundred thirty nine thousand three hundred one & 50/100 dollars ($29,339,301.50) in strict accordance with the specifications, schedules, and drawings, * * *."

The detailed requirements of the contract are set forth in Exhibits "A" and "B," consisting of copies of the contract and specifications. For the purpose of this case it is sufficient to say that appellants agree to build the dam and power plant for a lump sum specified in the contract. The United States furnishes the site, prescribes plans and specifications in detail, requires all work to be done under its direction and control and to its satisfaction, and undertakes to furnish the greater part of the material. The contractor agrees to furnish equipment and to employ labor, and generally to supply the work necessary to erect the

dam and power house but subject in all ways and at all times to the direction, supervision and control of the government. The original contract has been amended by the government (pursuant to power reserved) to provide for the construction only of the foundation for the much larger high dam. This change, while increasing the amount involved by more than $7,000,000, does not change the character of the work or the conditions under which it is carried on.

The Grand Coulee Dam is located approximately in the center of the State of Washington, at the head of what is known as the "Grand Coulee." It is the key structure in all of the plans for the regulation and control of the Columbia River and its tributaries. When completed it will create a quiet water pool extending from the middle of the State of Washington to the Canadian boundary, a distance of over 150 miles. It is being built pursuant to the recommendation of the Chief of Engineers, United States Army.

Under date of March 29, 1932, the Secretary of War transmitted to Congress a report by the Chief of Engineers, United States Army, made pursuant to the Rivers and Harbors Act of January 21, 1927. This report (House Document 103 of the 73d Congress, First Session) recommended the construction of ten dams across the Columbia River at places within the State of Washington or on the boundary line between Washington and Oregon. One of these dams, the Grand Coulee Dam is now in course of construction pursuant to the authorization of Congress contained

in the Rivers and Harbors Act of the 74th Congress, which we quote in part:

> "For the purpose of controlling floods, *improving navigation,* regulating the flow of streams of the United States, * * * and for the generation of electric energy as a means of financially aiding and assisting such undertakings, the projects known as * * * 'Grand Coulee Dam' on the Columbia River, are hereby authorized and adopted, * * *."

The Columbia River is one of the great rivers of the world. In North America it is second only to the Mississippi in size. It rises in Canada and enters the United States on the northern boundary of the State of Washington. Flowing southerly through the middle of that state it turns west and flows to the Pacific Ocean, forming the southern boundary of the State of Washington and the northern boundary of the State of Oregon.

The Columbia River throughout its course is navigable, both in fact and in law. Historically, it has formed one of the highways of commerce. Its lower reaches are navigated by ocean-going vessels of the largest size, carrying an important part of the trade of the United States with Pacific Ocean ports, including Alaska, South America, the Hawaiian Islands and the Orient.

The site of the Grand Coulee Dam is a reservation of the United States government. Exhibit "C" is a map and letter of explanation showing the land acquired by the United States and the use to which it is put. Briefly stated, the dam itself, all structures in

connection with it as a completed entity, the contractor's camp and all structures therein, and all operations of either the government or the contractor in connection with building the dam are located upon this reservation. The State of Washington has consented to this purchase and has ceded jurisdiction over the land by statute. Remington's Revised Statutes, § 8108.

THE WASHINGTON OCCUPATION TAX

The Tax Commission of the State of Washington have levied a tax of ½ of 1% of the gross sum agreed to be paid to appellants by the United States for the building of the dam. The levy is pursuant to the Occupation Tax Act, originally enacted by Chapter 191, p. 869, Session Laws of 1933, amended by Chapter 57, p. 157, Laws Special Session 1933. The nature of the tax appears from its title, which we quote:

> "An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities * * *."

Section 2-a (1) of the Act as amended in part provides:

> "* * * there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services * * * an annual tax or excise for the privilege of engaging in such business * * * equal to the gross income of the business multiplied by five-tenths of one per cent; * * *."

By section seventeen of the Act the tax commission is empowered to bring an action to enjoin any tax-

payer from continuing to engage in business because of non-payment of the tax.

The Supreme Court of the State of Washington holds that this occupation tax is not a property tax nor an income tax nor a tax upon business but is an excise levied upon the privilege of engaging in business within the state. State v. Yelle, 174 Wash. 402, Rainier Nat. Park v. Henneford, 182 Wash. 159, 45 Pac. (2d) 617, Silas Mason, Inc. v. State Tax Com., 88 Wash. Adv. Op. 60.

SUMMARY OF THE FACTS

The United States in the exercise of its constitutional power to regulate commerce is engaged in constructing a dam across a navigable river upon land which it has acquired within the State of Washington. The site, the materials, the plan and detailed specifications, and the control and supervision of the work are all directly supplied by the United States. The largest proportion of the total cost is paid directly by the United States. The appellants, under the direction and supervision of the United States, are building the foundation of the dam. Since appellants are nonresidents who have come into the state solely for the purpose of performing this work and are in fact engaging in no other occupation therein, the tax is levied solely on the privilege of building the foundation for the United States.

IV.

ASSIGNMENT OF ERRORS

Appellants assign the following errors in the record and proceedings in the said case. That the statute of the State of Washington imposing an occupation tax is unconstitutional and void as applied to the particular transactions stated in the complaint of appellants in this:

1. That the challenged tax is levied directly upon the consideration paid by the United States to the appellants for the performance of a contract by means of which the United States Government is carrying on a governmental enterprise. The Supreme Court of the State of Washington erred in holding such a tax to be a valid exercise of the taxing power of the State, and erred in affirming the judgment of the Superior Court of the State of Washington, for Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

2. That the contract between the United States Government and appellants upon which the challenged tax is levied is being performed upon land acquired by the United States for the purpose. Exclusive jurisdiction over this land has been ceded by the State of Washington to the United States. The Supreme Court of the State of Washington erred in holding that the State of Washington has power to tax the occupation carried on by appellants in that territory, and erred in affirming the judgment of the Superior Court of the State of Washington, for

Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

V.

ARGUMENT

A. NATURE OF TAX.

The Washington Occupation Tax is not a tax upon appellants' property, either in form or substance; nor is it levied in lieu of a tax upon property. It is in addition to the ordinary property taxes. It is not a license tax upon foreign corporations, nor in lieu of such a tax. It is in addition to the ordinary license fee paid by foreign corporations. Nor is it an income tax levied upon net income. It is in substance what it is in name, that is: an excise measured by gross income.

The tax, laid in form upon appellants in this case, is clearly a tax laid in substance upon a purchase by the United States because of two circumstances. First: the only income of appellants is the sum paid them by the United States pursuant to their contract, because the only occupation of appellants within the State of Washington is furnishing to the United States the things called for by their contract. Even in form, the tax is levied directly on the price of a purchase by the United States. Second: the tax is measured by the gross income of appellants (that is to say, by the gross purchase price paid to them by the United States).

B. TAX MEASURED BY GROSS INCOME A DIRECT BURDEN.

It is established by the cases, indeed it has never been questioned, that a tax upon or measured by a gross (as contradistinguished from net) income is a direct and immediate (as contradistinguished from indirect and remote) burden upon the transaction or occupation producing the income. In United States Glue Co. v. Oak Creek, 247 U. S. 321, the court says (p. 328):

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."

In Fox Film Corporation v. Doyal, 286 U. S. 123, the court says (p. 126):

> "The Gross Receipts Tax Act (Georgia Laws, 1929, p. 103), describes the tax as laid upon the privilege of engaging in certain occupations 'and upon certain business and commercial transactions and enterprises.' As the tax is measured by gross receipts, the case is not ruled by Educational Films Corp. v. Ward, 282 U. S. 379, where the tax was based upon the net income of the corporation. Appellant insists, and we think rightly, that the operation of the statute here in question, in its application to gross receipts, is to impose a direct charge upon the royalties."

Without further quotation we call the Court's attention to the cases of Crew Levick Co. v. Pennsylvania, 245 U. S. 292, Northwestern Insurance Co. v.

Wisconsin, 275 U. S. 136, and Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, in which the distinction is pointed out and made the basis of decision.

C. SUBSTANCE NOT FORM DETERMINES VALIDITY OF TAX.

It needs but to be stated that the power of the United States government to regulate commerce is conferred by the Constitution of the United States. No excise tax on the exercise of this power can be valid. Likewise the power extends to the choice of the means to be employed. The United States may choose, as at the Grand Coulee Dam, itself to purchase cement and steel and employ engineers. The cases are uniform in holding that a tax upon such purchases is void. It may choose, as at the Grand Coulee Dam, instead of purchasing cement, steel and services separately, to purchase a structure completed in whole or in part, which combines the cement, steel and services purchased by it with other material and services supplied by a contractor. In reason and substance, the purchase of material and services jointly instead of separately is not different. The final result to the United States is the same, namely: a completed dam for the regulation of commerce. In either case the effect of a tax upon the purchase is the same, namely: a higher purchase price which the United States must pay.

To say that the purchase by the United States of materials or services is not taxable because the added

cost is an interference with its constitutional functions, but that a contract for the supply of the same materials and services is taxable, is to disregard the substance and nature of things and to look merely at forms and names. Equally, to say that a sale to the United States is not taxable nor is a contract amounting to a sale taxable, but that the income derived from the sale or contract may be taxed or be used as the measure of computation for a tax, is likewise to disregard substance and to look only at form. This Court has never indulged form at the expense of substance by such reasoning.

In tax questions, as in others, the Court has always looked to the substance and disregarded the form. The effect of a tax act and not its name determines its validity. "The substance and not the shadow determines the validity of the exercise of the taxing power."

A tax laid in terms on the occupation of an importer is in effect a tax on imports. Brown v. Maryland, 12 Wheat. 419, 444. Answering the contention that a state may tax an occupation, and that this tax was nothing more, Chief Justice Marshall said:

> "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. * * * So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer,

> or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution."

In brief the cases have held: a tax on the occupation of an importer is, in effect, a tax on imports, Brown v. Maryland, supra; a tax on the income of an office is a tax on the office itself, Dobbins v. The Commissioners, 16 Pet. 435; a tax upon the business of an auctioneer, measured by the amount of sales, is a tax upon the sales and invalid, so far as sales of imported goods were concerned, because in substance a tax on imports, Cook v. Pennsylvania, 97 U. S. 566; a tax on bills of lading is a tax on the articles covered, Fairbanks v. United States, 181 U. S. 283; a tax on charter parties is a tax on the articles covered, United States v. Hvoslef, 237 U. S. 1; a tax on policies of marine insurance is a tax on the goods insured, Thames Insurance Company v. United States, 237 U. S. 19; a tax on the business of selling goods in foreign commerce is a tax on exports, Crew Levick v. Pennsylvania, 245 U. S. 292. See also Indian Oil Co. v. Oklahoma, 240 U. S. 522, Gillespie v. Oklahoma, 257 U. S. 501, Burnet v. Coronado Oil & Gas Co., 285 U. S. 393.

APPLICATION OF THE CASES

In logic and by precedent there is no distinction between a purchase of a single item by the United States for use in the Grand Coulee Dam and the simultaneous purchase of many items combined with services (as by the contract with appellants) for use in the Grand

Coulee Dam. Both, irrespective of form, in fact are purchases by the United States. Likewise, the fact that the tax in form is payable by appellants and measured by their gross income, does not disguise the fact that it is levied on a purchase by the United States.

D. PURCHASES BY THE UNITED STATES NOT TAXABLE.

Not only is the tax upon appellants, actually a tax upon a purchase by the United States, but it is a direct and immediate charge because it is measured by the gross purchase price, solely. The tax, which appellants must pay, rises or falls directly with the amount paid to them by the United States—no other factor enters into the computation. Directly upon each dollar which the United States pays the state levies tribute. That such a tax is beyond the power of a state, has uniformly been ruled.

Panhandle Oil Co. v. Knox, 277 U. S. 218, is precisely in point. There, the State of Mississippi levied "for the privilege of engaging in such business an excise tax of 1c (one cent) per gallon upon the sale of gasoline. * * *" Here the State of Washington levies "an annual tax or excise for the privilege of engaging in such business * * * equal to the gross income of such business multiplied by five-tenths of one per cent * * *." In short, there, as here, we have an excise tax levied on the privilege of engaging in business. The tax is measured as to amount by

gross sales or gross income which are one and the same. In that case, a gasoline dealer sold gasoline to the United States for the use of its Coast Guard fleet and in its Veterans' Hospital. In this case, appellants sell material and services to the United States for use in building a dam across a navigable river. It will not escape notice consequently that there, as here, the contract involved was a direct one between the United States and the dealer, and that the tax was in form an excise on the privilege of doing business within the state but measured as to its amount by the gross amount of sales to the United States. We quote (p. 221):

> "* * * The petitioner's right to make sales to the United States was not given by the State * * *; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. * *"

And again (p. 222):

> "* * * Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. * * * To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. * * *"

The perfect parallel shown by the facts of the Panhandle case and the present is emphasized by the court's analysis in the opinion. "Sale and purchase constitute a transaction by which the tax is measured * * *." (p. 222)—so here. The amount of

money claimed by the state rises and falls precisely as does the quantity of materials and labor secured by the United States. We submit, therefore, that here, too, "It is immaterial that the seller and not the purchaser is required to report and make payment to the state." (p. 222.) And that "While Mississippi (Washington) may impose charges upon petitioner (appellants) for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes." (p. 221.)

Panhandle Oil Co. v. Knox is followed by Indian Motocycle Co. v. United States, 283 U. S. 570, in which the question was of the power of the United States to tax a sale to a municipal corporation of the State of Massachusetts. The United States levied an excise tax on the manufacturer of motorcycles "equivalent to the following percentage of the price for which so sold * * *." (p. 573.) The court first finds that the excise though in form, levied on the manufacturer is, in fact, a tax on the sale. The court then comments on the facts in Panhandle Oil Co. v. Knox, and quotes the language of that decision, deciding finally that the same principle applies. The court says (p. 579):

> "Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which

the United States cannot tax consistently with the constitutional principle."

Of this case, also, it will be noted that the tax is an excise, levied in form on a private individual, measured as to amount by the gross sale price. Again the form is disregarded and the tax held to be on the sale. Again, it is held to be a direct and immediate burden. Again, we submit that the parallel facts in the Panhandle Oil Co. v. Knox case, in the Indian Motocycle Co. v. United States case, and the present case, require a like reasoning and a like conclusion. In all three cases, the tax is an excise laid directly (since in each it is measured by the gross sales price) on the sale to the government of an article purchased for government purposes. In the case now before the Court, as well as in the Indian Motocycle case, "The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected." (p. 579.) The conclusion drawn there must be drawn in the present case or "consistency of constitutional principle" vanishes.

The principle has again been applied and the reasoning and language of the Panhandle Oil Co. v. Knox case again been employed in Graves v. Texas Co., 298 U. S. 393. The statutes of Alabama enacted: "Every distributor, refiner, retail dealer or storer of gasoline * * * shall pay an excise tax of six cents per gallon upon the selling, distributing, storing or withdrawing from storage in this state for any use * * *." The Texas Company made written contracts with the Uni-

ted States to supply gasoline in large quantities over a period of time. The gasoline was produced and refined in Texas, transported to Alabama, stored there and delivered to the United States from time to time for use by the army, the department of the interior and the Tennessee Valley Authority. Now, once again, we have the parallel facts. An excise tax, levied in form on storage, but measured as to amount by gross deliveries. Again, the court looks through the form of levy to the substance and effect, saying (p. 401):

> "A tax upon anything so essential to the sale of gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement."

The court then quotes from Panhandle Oil Co. v. Knox and applies the principle there announced as controlling.

We submit that the excise tax the State of Washington is attempting to levy is much more directly, much less remotely, an interference with an essential undertaking of the United States. Here, the government has purchased a foundation for a dam which will be used for the improvement of navigation and the regulation of commerce. Upon this purchase the State of Washington is attempting to levy an excise under the disguise of a tax on the occupation of building dam foundations. But this is to tax an undertaking of the United States directly. In Graves v. Texas Co. the tax is on the storage of gasoline, which is ultimately supplied to the United States for use by the Tennessee Valley Authority, which, in turn, is im-

proving navigation and regulating commerce by means of dams in the Tennessee River. The storage, and the tax thereon, is separated in time and in logical connection from the regulation of commerce. Here the tax on the purchase price of the dam is direct and immediate, separated neither in point of time nor in logical connection.

Of course, it is clear that, if a tax of one half of one per cent may be levied on a project of internal improvement carried on by the United States, the rate may be increased to 1%, 5%, 10%, etc. Likewise, if one state may tax such an operation of the United States, so may other states tax those within their bounds. In short, the principle of such taxes involves so heavy a cost to the United States as to amount to a very real burden on any work of internal improvement undertaken by the United States.

E. TAX ON MEANS EMPLOYED A DIRECT BURDEN ON GOVERNMENTAL FUNCTION.

The point at issue, however, is not entirely, nor even principally, one of financial loss to the United States. The United States and the State of Washington, for present purposes, are independent sovereignties. It is contrary to the principles of our Constitution, it is derogatory to the dignity of the United States, that a state should be permitted to control the operations of the United States by dictating to it how the work shall be carried on. The prime question then is not so much whether the United States, by reason of a state tax,

shall be required to pay few or many dollars for a public improvement; but whether the states may decide that a particular method of accomplishing the desired end shall or shall not be employed. The choice of the means to be employed for the regulation of navigation and control of commerce is of necessity in that power to which the regulation is committed—the United States. If a state may levy a tax on one means or method of performing the work, it may, by increasing the tax to prohibitive amounts, altogether prevent the United States from using that means or method.

Having the right to regulate commerce and hence to improve the navigation of the Columbia River, the United States necessarily has the right to decide how the improvement of navigation may be effected. The Chief of Engineers of the United States Army advised Congress that the improvement of the Columbia River could best and most economically be effected by means of a series of dams of which the Grand Coulee dam is the key structure. The design and method of construction of these dams must of necessity be solely within the choice of the United States. Equally the choice whether, in whole or in part, the Grand Coulee Dam shall be built by contracts (such as that with appellants) or by other means or methods, must of necessity be that of the United States.

This choice of means the State of Washington may not burden or control consistently with constitutional theory and the accepted rule of this court. Yet it does burden and control this choice of means by the tax in

question. As noted above, if the state may impose a tax on the contract of appellants, it may determine the rate of taxation. By making this rate prohibitive the state may forbid that means or method of building the Grand Coulee Dam. That a tax so levied is a direct burden on the choice of means by the United States or, what is the same thing, an attempt by taxation to control an operation of the United States is stated in many and is implicit in all the cases.

> McCulloch v. Maryland, 4 Wheat. 316, 436: "The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government."

The same reasoning was employed and the same result announced in Osborn v. United States Bank, 9 Wheat. 737. In the course of its opinion, the court remarked (p. 866):

> "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative."

The reason underlying the rule that neither the bank nor the contractor can be taxed by the state, in the one case for making purchases or transporting provisions, in the other for conducting its trade, lies not in the character of the bank nor of the contractor but in the fact that a tax is a direct burden on the

choice by the United States of the means or method, in the one case of supplying its military posts and in the other of conducting its fiscal operations. In the case of a military post the United States might choose to purchase eggs, or milk, or cattle directly from a farmer, or it might choose to make a contract with a contractor to supply the provisions to the post. Having the right to choose the means of supplying the post, its choice cannot be controlled by a state under the guise of a tax.

Weston v. Charleston, 2 Pet. 448, 468:

> "The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised."

Again, there underlies this decision the thought that to tax one means of exercising a constitutional power of the United States is to control or burden that power directly.

The cases of Western Union Telegraph Company v. Texas, 105 U. S. 460, and Williams v. Talladega, 226 U. S. 404, were both cases of a state excise tax on the transmission of telegrams sent by officers of the United States on public business. Although the excise in form was levied on the telegraph company, it was held to be a burden on the means employed by the government to execute its constitutional powers, and therefore void.

In the first case, Telegraph Company v. Texas, the court says, page 466:

> "As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and, therefore, void. It was so decided in McCulloch v. Maryland (4 Wheat. 316) and has never been doubted since."

This language of the court is quoted with approval in the subsequent case of Williams v. Talladega, supra.

Again, we beg the court to notice that the basis of the ruling is that the means of communication by officers of the United States is within the choice of the United States; that a tax on one means of communication might be used to prevent that method of communication and therefore is a direct burden on the exercise of the constitutional powers of the United States. It was open to the officers to communicate the government's business by means other than the telegraph, for instance, by letter or by messenger. But so long as the right to choose the means to be employed rests in the United States, no state may influence that choice by making one means more expensive because of the levy of a tax thereon.

Farmers Bank v. Minnesota, 232 U. S. 516, 526:

> "But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the

> last analysis, to impose a tax upon the right of the municipality to issue them."

It is of course obvious that it is implicit in this case that a tax upon the right of the municipality to issue bonds amounts to a control by the state of the choice of means to raise money.

Panhandle Oil Company v. Knox, 277 U. S. 218, shows that the basis of this court's holdings that a sale to the United States may not be taxed by a state, lies in the right of the United States to choose its own means and sources of supply. In other words, it lies in the right of the United States to choose for itself its means of performing its governmental powers.

The same idea is implicit in Indian Motocycle Co. v. U. S. 283, U. S. 570, and Graves v. Texas Co., 298 U. S. 393. In the one case the tax on a sale of a motorcycle to a state's police department was held to be invalid; in the other, a tax on the storage of gasoline sold to the United States was held invalid. Implicit in these decisions is the thought that the tax, by adding in the one case to the cost of the motorcycle and in the other to the cost of the gasoline, controlled the choice by the municipality and the United States of the means employed in carrying on their respective governmental functions.

In the course of more than a hundred years, many judges have stated the rule forbidding a state by taxation to interfere with operations of the United States. Naturally, the language employed has varied with the habit of expression of the individual judge and with the circumstances. We submit, however, that the idea

underlying the different words employed is always the same. It may be expressed thus: to the United States have been confided certain sovereign powers; how, by what mode, by what method, in what manner, by what person, employee, agent, or instrument these sovereign powers shall be exercised must of necessity likewise be confided to the United States; the states may not interfere with the power directly; they do interfere with the power directly when they impose a tax which does, or may, influence the decision of the United States as to how, in what mode, by what method, agency or instrumentality, etc. its sovereign powers shall be exercised. This, however expressed, is always the underlying idea. The immunity from taxation is that of the United States, never that of the agent or instrument. Nor does the question, whether in a given case the execution of one of its sovereign powers is or may be interfered with, ever depend on the character or constitution of the agent. The question always is, not the effect on the agent, but the effect on the United States.

Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 429, remarks "that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts control. * * *"

In Osborn v. United States Bank, 9 Wheat. 737, the attorneys for the State of Ohio claimed that the United States Bank was an independent contractor. Re-

plying to this contention, Chief Justice Marshall said that if the bank was in fact a contractor, still the state might not control its operation.

This court in California v. Pacific Railroad, 127 U. S. 1, describes the contract between the Railroad and the United States as a franchise and holds that it may not be taxed by the State of California.

Leloup v. Port of Mobile, 127 U. S. 640. The court refers to the telegraph company as engaged in the occupation ~~or~~ business of sending telegrams for officers of the United States. The tax on such telegrams is held invalid.

In Williams v. Talladega, 226 U. S. 404, a similar tax imposed on the telegraph company was held invalid, the court describing the telegraph company as an agency of the federal government.

Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292. The railroad under contract with the United States government was engaged in mining coal upon certain Indian lands. A statute of the State of Oklahoma subjected persons engaged in mining coal to a tax measured by the gross receipts from the coal mined. This court held the tax to be beyond the power of the state. It refers to the railroad company as an instrumentality of the United States and as an agency of the United States.

Indian Oil Co. v. Oklahoma, 240 U. S. 522. This was a case of oil leases and subleases of Indian lands. The State of Oklahoma sought to reach the leases by taxing the stock of the corporation which owned the

leases. The court held the tax invalid, saying (p. 530):

> "* * * A tax upon the leases is a tax upon the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, * * *."

Gillespie v. Oklahoma, 257 U. S. 501. This was an attempt to tax the net income of a lessee from leases similar to those involved in the two preceding cases. The tax was held invalid. In one part of the opinion the oil company is referred to as an instrumentality of the United States, then later it is said (p. 506):

> "* * * The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards."

Similar holdings with analogous language and analogous principles are Jaybird Mining Co. v. Weir, 271 U. S. 609, and Burnet v. Coronado Oil & Gas Co., 285 U. S. 393.

The oil company in Panhandle Oil Co. v. Knox, supra, the motorcycle company in Indian Motocycle v. United States, supra, Texas company in Graves v. Texas Company, supra, the United States bank in McCulloch v. Maryland, supra, and in Osborn v. United States Bank, supra, the telegraph company in Western Union Telegraph Co. v. Texas, supra, and Williams v. Talladega, supra, the railroad company in California v. Pacific Railroad Company, supra, the

telegraph company in Leloup v. Port of Mobile, supra, the railroad company in Chotaw & Gulf R. R. v. Harrison, supra, the oil company in Indian Oil Company v. Oklahoma, supra, and in Gillespie v. Oklahoma, supra, and the mining company in Jaybird Mining Co. v. Weir, supra, and the oil company in Burnet v. Coronado Oil & Gas Company, supra, were none of them subdivisions or officers of the federal or state government in such a sense as to entitle them to exemption from state or federal taxation by reason of their character. The banks, the railroads, the telegraph companies, the mining companies and the oil companies were each and all engaging in private business for gain. In each and every case their only connection with the federal government was a contract with it to perform certain things for it. We submit that whether a person or corporation, making a sale to the United States or performing services for it, be referred to as an instrumentality or an agency, or whether the challenged tax be referred to as resting upon the instrumentality or agency, or upon the contract or franchise, still the ground of every case is interference with the operation of a governmental function of the United States or of a state. We submit further, that whenever the tax directly adds to the purchase price or consideration the United States must pay, then it is a direct burden upon the means chosen by the United States to perform a governmental function. Whenever this is the effect of the tax, it is void.

In all the cases, the court is seeking to prevent interference by one sovereignty with the exercise of some

power confided to the other. A tax, when levied upon one of several possible means of exercising the power, operates necessarily to influence the decision whether that means shall be employed. The influence is direct, the burden is apparent, because the means to be employed can be compelled by taxing every means except the one. Thus, in the present case the State of Washington can compel the United States to build the Grand Coulee Dam through government employed labor, if it may tax, at prohibitive rates, every other means of building a dam. Such a tax then, laid on one of several means of exercising a power, is properly said to be laid on the choice of means.

The case of Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466, is an apt illustration of the proposition. In the exercise of the power to regulate commerce the United States was engaged in building levees in aid of navigation of the Mississippi. So far, the case is parallel to building a dam in the Columbia River in aid of navigation. The United States exercised its power to choose the means of doing the work by letting a contract to the construction company. Again as in the present case. The State of Louisiana levied a tax of five cents per gallon upon gasoline purchased by the contractor for use in his power driven machinery. Mark, if you please, the difference here. The tax is not levied on one of the several means within the choice of the United States and therefore it did not affect its choice of means. This the court recognizes in the following language (p. 472):

> "It is not laid upon the choice of means, the making of the contracts, the contracts themselves,

> or any transaction to which the federal government is a party or in which it is immediately and directly concerned."

Precisely so. The challenged tax was not laid upon the *government's* choice of means, but upon the *contractor's* choice of means in the details of *his* performance. How or by what means the contractor should perform his work was pursuant to his policy and his ends, not the government's. This is made yet more plain in the next sentence:

> "Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor."

Suppose, however, the challenged tax in the Grosjean case were one "laid upon the choice of means," "or the contracts themselves," would not the tax have been held invalid? Suppose, instead of on the contractor's property, the tax in the Grosjean case laid (as in the case at bar) as an excise upon the privilege of performing the contract with the government, would not such a tax be laid "upon the choice of means" of the government, or (differently expressed) "the making of the contracts, the contract themselves," or a transaction "to which the federal government is a party *and* in which it is immediately and directly concerned"?

Suppose, again, "the exaction laid and dependent upon the amounts received by the contractor" (and for the sake of emphasis upon the *gross* amount) would not that have labeled the tax as one laid upon the choice of means, the making of the contract, the contracts themselves, and a transaction to which the gov-

ernment was a party, and in which it was immediately and directly concerned.

In the case at bar, the tax is an excise tax upon the privilege of performing a contract with the United States and measured as to its amount by the gross sum paid to the contractor by the United States government. As such, we submit it to be a tax levied upon the choice of means of the United States, or upon the making of the contract, or upon the contract itself, or upon a transaction in which the United States is immediately and directly concerned. As such, it is beyond the power of the state.

F. THE GRAND COULEE DAM AN EXERCISE OF CONSTITUTIONAL POWER.

That the improvement of the navigation of a navigable river is a proper exercise of the commerce power of the United States and that a proper means of improving navigation is the control of water by dams and that the declaration by Congress of its purpose to improve navigation by such means is not open to question, are propositions established by the decisions. Green Bay Canal Co. v. Patten Paper Company, 172 U. S. 58; Arizona v. California, 283 U. S. 423; Trinityfarm Co. v. Grosjean, 291 U. S. 466; Ashwander v. Tennessee Valley Authority, 297 U. S. 288. Since the statute authorizing the erection of the Grand Coulee Dam states that its purpose is the improvement of navigation, it is a necessary consequence that the enterprise is undertaken in furtherance of a consti-

tutional power of the government of the United States.

G. STATE WITHOUT JURISDICTION TO TAX TRANSACTION.

All work under the contract between appellants and the United States is done upon land acquired by the United States by purchase with the consent of the State of Washington. The parties at the trial stipulated to the fact of purchase. The consent of the State of Washington has been given by statute. Rem. Rev. Stat. § 8108. Appellants in this case contend that since exclusive jurisdiction over the premises upon which their contract must be performed has been ceded to the United States, it follows that no jurisdiction to tax the occupation of performing the contract can be asserted by the State of Washington.

The present case was tried at the same time as the cases of David H. Ryan, Appellant v. The State of Washington, Appellee, and David H. Ryan, Appellant, v. Tax Commission of the State of Washington; Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, constituting the Tax Commission of the State of Washington, Appellees. (Referred to herein as the Ryan cases.) To save the burden on court and parties of introducing the same evidence and repeating the same stipulations in each of the cases, it was stipulated that the evidence introduced and stipulations made in the several cases should be considered as introduced and made in each of the others. The record on appeal to the Supreme Court of the State of Wash-

ington was so prepared and certified. On that appeal, the cases were again set together. By agreement, the question of cession of jurisdiction to tax was presented in the briefs in the Ryan cases while the other questions were presented in the present case. This arrangement was carried out at the oral argument by consent of the court. The decisions of the court follow the same plan. The appellants in both cases have preserved the questions at all stages of the cases.

Counsel for appellants in this case have asked leave to file a brief amici curiae in the Ryan cases and to be permitted to participate in the oral argument. It will manifestly be of convenience to the court as well as to counsel to follow the arrangement adopted in the state courts. Appellants therefore submit this point on the briefs and argument in the Ryan cases.

CONCLUSION

It is submitted that the judgment of the Supreme Court of the State of Washington dated October 28, 1936, should be reversed and judgment rendered in favor of the appellants.

Respectfully submitted,

B. H. KIZER,
ARNOLD L. GRAVES,
Counsel for Appellants.

GRAVES, KIZER & GRAVES,
Of Counsel for Appellants.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 7

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as ATKINSON-KIER COMPANY, and MASON-WALSH-ATKINSON COMPANY,

Appellants,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON; HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, constituting the Tax Commission of the State of Washington,

Appellees.

APPELLEES' BRIEF

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES' BRIEF

G. W. HAMILTON,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellees.

Post Office Address: Temple of Justice, Olympia, Wash.

STATE PRINTING PLANT, OLYMPIA, WASH.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 773

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as ATKINSON-KIER COMPANY, and MASON-WALSH-ATKINSON COMPANY,

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TAX COMMISSION OF THE STATE OF WASHINGTON; HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, constituting the Tax Commission of the State of Washington,

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APPELLEES' BRIEF

G. W. HAMILTON,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellees.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

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IN THE

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OCTOBER TERM, 1936

No. 773

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as ATKINSON-KIER COMPANY, and MASON-WALSH-ATKINSON COMPANY,

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TAX COMMISSION OF THE STATE OF WASHINGTON; HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, constituting the Tax Commission of the State of Washington,

Appellees.

APPELLEES' BRIEF

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES' BRIEF

STATEMENT OF THE CASE

This is an appeal from a judgment of the supreme court of the State of Washington reported in 88 Wash. Dec. 60, 61 Pac. (2d) 1269, (R. 56)

sustaining the Washington State Occupation or Business Tax (Chapter 191, Laws of 1933, page 869 *et seq.* as amended by Chapter 57, Laws of 1933, Ex. Sess., page 157 *et seq.*) as imposed upon the business conducted for gain by independent contractors in the construction of Coulee Dam and power plant under contract let by the Federal government through the Bureau of Reclamation.

Inasmuch as appellants seek to construe the tax as one upon the contract rather than as a tax on private business conducted by the contractors or as a tax upon sales to the United States government, it will be necessary to briefly review the character of the Coulee Dam project.

The Coulee Dam Project Was Initiated by the State of Washington

The Columbia Basin Commission was created as an agency of the State of Washington by chapter 81, Laws of Washington for 1933. On behalf of the state, and using state moneys, it let contracts for the first steps in the work, that is for core drilling and for test pit and trench work.

The State of Washington also defrayed the expenses of the Bureau of Reclamation in doing the necessary engineering work and in the preparation of the very plans under which appellants in this case are working.

By stipulation, all of the original exhibits (too voluminous to be printed) have been made a part

of the record in this case for consideration on this appeal: The reports of the Columbia Basin Commission show that the State of Washington bore the expense of the appraisal of private property which it might be necessary to acquire in connection with the project. (Exhibits D, E, R. 89.)

In short, the State of Washington carried on the project until relief moneys were allotted to it under the National Industrial Recovery Act. (48 U. S. Stats. at Large 195.)

This act, approved June 16, 1933, was for the purpose of encouraging national industrial recovery and providing for the construction of useful public works.

By Sec. 202 of Title II of this act the emergency administrator of public works, under the direction of the President was authorized to prepare a program of public works including projects for the conservation and development of natural resources whether said public works were authorized by a state or any political subdivision thereof.

By Sec. 203 thereof (for the purpose of increasing employment quickly) the President was empowered to construct or aid in the construction of any such project, to make grants to states, municipalities and other public bodies and with relief moneys acquire by purchase or condemnation any property necessary.

The first resolutions (July, Sept. and Oct., 1933) allotting such relief moneys to this project provided that the State of Washington should reimburse the Federal government for amounts so expended, and the moneys allotted were to be expended in accordance with the terms of a contract satisfactory to the administrator of public works and the State of Washington. (R. 17 to 20.)

By resolution of March 14, 1934, the project was formally included in the Federal Public Works program, and a sum of money allotted and transferred to the Bureau of Reclamation, Department of Interior, to carry on the work. (R. 20.)

Exhibit 6 attached to the amended complaint is a copy of the contract between the State of Washington acting through the Columbia Basin Commission and the United States acting through the Commissioner of the Bureau of Reclamation whereby the Bureau of Reclamation agreed to do certain work, such as the preparation of plans, to the extent of $377,000 which money was to be furnished by the State of Washington. (R. 21.) This contract was carried out by both parties and as a result thereof the plans on which appellants are now working were prepared.

A contract was tendered to the State of Washington by the Secretary of the Interior following the allocation of N. I. R. A. moneys for the project. It was executed on behalf of the state and returned to

the Secretary of the Interior, but the state has not been advised of the action taken thereon. (R. 27.)

It will be seen that the project was referred to as a power project, and inasmuch as it was supposed to be self-liquidating, paragraph 12 of the contract as prepared by the Department of Interior provided that title to the dam and power plant should remain in the United States until the cost of the project had been fully repaid. (R. 30.)

The agreement then provided that the Columbia Basin Commission was to act in an advisory capacity, and it gave to the State of Washington an option whereby it might purchase the perpetual right to the entire power output of the first unit of the project which was the dam and power plant. (R. 30.)

As found by the trial court, the project was fostered by the efforts of the state and Federal governments to bring relief to the unemployed by virtue of and within the spirit of the National Industrial Recovery Act. Its primary purpose at the time was to relieve unemployment. (R. 53.)

A second purpose was to irrigate and reclaim a vast area of land in both public and private ownership, which land would eventually become the property of the citizens of the State of Washington who would contribute to the cost of the project. (R. 53.)

Another purpose, of course, as expressed in the agreements and resolutions allotting moneys to the

state, was for the production of power, and it was contemplated that the sale of power would defray the cost of the project.

The work actually performed by the state was let to independent contractors, and, when an allocation of relief moneys was made to the Bureau of Reclamation for the purpose of continuing the Coulee Dam project, the Bureau of Reclamation advertised for bids, and the work was let to the lowest and best bidder under the regular public works form of contract approved by the Federal Emergency Administrator of Public Works, September 7, 1933 (P. W. A. Form No. 51.) One of such contracts, identified as No. 12R3789, was let to a general contractor, David H. Ryan, in November, 1933. It involved excavation work necessary to the construction of the dam. Another such contract, identified as No. 12R4227, was let to David H. Ryan for the construction of a railroad extending to the project from the town of Odair, Washington, situated some thirty miles from the project.

Both of these contracts are involved in the case of *Ryan v. State* on appeal to this court in cause No. 774, October Term, 1936.

The same form of contract, but identified as No. 12R4359, was awarded to appellants in this case for the construction of the first unit of the dam in July of 1934. (R. 92.)

All of these contracts require the contractor to

do the work according to the specifications for a unit price submitted in the bids, the total amount of the contract for purposes of computing the bond furnished by the contractor being the sum of the various quantities estimated by the engineers multiplied by the unit price bid.

In all of these contracts the contracting party furnishes a bond to guarantee completion, and as an independent contractor is free to adopt any proper method or means of completing the contract.

That portion of the contract awarded to appellants was for the first unit of the project which was solely for the production of power. The change involves a widening of the base, and that portion of the dam now being constructed by appellants is simply an enormous base to sustain the high dam which it is contemplated will be erected and which will be used for the production of power and for the irrigation of thousands of acres of arid lands. (R. 106.)

The individual appellants for purposes of expeditiously carrying out the contract organized a corporation, the Mason-Walsh-Atkinson-Kier Company which qualified to do business in the State of Washington and is actually executing the contract as an agent of the other appellants.

This corporation at first had its office and principal place of business in the city of Spokane, Washington, which is removed from the site of the proj-

ect. It maintained its offices there until the work had progressed to such an extent that it could move its offices to the site where it now conducts, as the supreme court of the state found, stores, messhouses and other commercial activities for the convenience of great numbers of employees and their families. (R. 56.)

The supreme court found that these collateral activities were conducted under state laws, and that all taxes levied by the state were paid with respect thereto.

The area occupied by appellants in the operation of these collateral activities was acquired for purposes of the project by the Federal government, but is now known as Mason City, Washington, and is governed under state law, that is, by the proper state and county authorities. (R. 107.) Appellants have been required to, and in fact do, submit to the requirements and protection of the state law, including taxation, with the single exception of the tax here objected to.

It will be seen that this project initiated by the state, encouraged and finally adopted by the Federal government, was entirely without act of Congress. The contracts were let to appellants without specific authority of Congress. The lands were purchased without approval of the Attorney General as required in the purchase of lands by the United States government. It was apparent that there was

a grave question therefore as to the authority of the Federal government to engage in such a project either as an irrigation or a power project, and it was for this reason that the moneys were allocated to the State of Washington.

The 74th Congress, by amendment to the Rivers and Harbors Bill, approved August 20, 1935 (Public Act 409), (Statutes of United States for 1935, p. 1039), adopted and ratified all contracts which had theretofore been let in connection with the Coulee Dam and other similar projects. In this act the project was described as for the purpose of aiding navigation and regulating the flow of streams, as well as the reclamation of public lands and the generation of electrical energy which it was contemplated would financially aid the project.

There is no act of Congress establishing a federal reservation, nor is there any order of any administrative official connected with the Federal government establishing any reservation. There is no Federal reservation, in fact. (R. 103-4-5.) Exhibit "C" is a map showing a portion of property acquired and being acquired for the irrigation project, but it does not purport to be a reservation by metes and bounds and it is admittedly governed by the laws of the State of Washington. The dam itself, which is being constructed by appellants as independent contractors, rests upon the bed of the navigable river which is the property of the State of Washington.

A section of school lands, the title of which is in the State of Washington, is occupied by the Federal government and used in part by the contractor in connection with this project. (R. 104, 106.)

There is no statute of the State of Washington consenting to the purchase of any of these lands, or ceding jurisdiction to the Federal government, other than certain general statutes which are relied upon in the companion case of *Ryan v. Tax Commission.* While appellants in this case make an assignment of error based upon their claim that there is a Federal reservation outside of the State of Washington, the point was not argued specifically below, and appellants by the very terms of their contracts were required to and actually did submit to the legislative jurisdiction of the State of Washington.

TERMS OF APPELLANTS' CONTRACT REQUIRE SUBMISSION TO THE JURISDICTION OF THE STATE OF WASHINGTON

Inasmuch as appellants are engaged in the construction of the base of a huge dam to be used ultimately for power and irrigation projects which are essentially state projects, the contract quite naturally required appellants to submit to the jurisdiction of the State of Washington. Article 21 of the contract required the contractor to comply with the workmen's compensation laws of the State of Washington. This was done, and the contractors themselves have voluntarily complied with and are now

enjoying the benefits of the Industrial Insurance Act of the State of Washington.

Specification No. 35 which is a part of the contract specifically requires the contractor to comply with all laws and regulations of the State of Washington or any agency or subdivision thereof which affect the building, maintenance or operation of the contractors' camp required by the same specification to be erected on land acquired by the Federal government for that purpose.

Specification No. 38 requires the contractor to dispose of garbage and refuse as required by the contracting officer or by the proper state "* * * or local regulatory authority * * *." It provides that the discharge of sewage shall conform to the laws and regulations of the Department of Health for the State of Washington.

Specification No. 42 requires that the contractor should make all necessary arrangements with the proper state and county authorities for school facilities and instruction for families of the contractors, employees and other residents in the camp site. There are two school districts regularly established by the state on the area used for the project. (R. 106.)

Specification No. 43 provides for the cooperation of the Washington State Patrol with the government in furnishing police protection.

In brief, the state and county governments exercise every function normally exercised in other parts of the State of Washington, and appellants in conducting their various businesses have voluntarily submitted to and enforced state laws, including the collection of state taxes.

ARGUMENT

THE TAX INVOLVED IS VALIDLY IMPOSED ON A LOCAL BUSINESS, AND IS NOT A FORBIDDEN BURDEN ON THE UNITED STATES GOVERNMENT OR ITS INSTRUMENTALITIES

Inasmuch as appellants have attempted to construe the occupation tax involved in this case as a tax either directly upon the contract executed by the government, or upon sales to the government, an understanding of the state's plan of taxation which was in effect at the time appellants bid on the contract is important.

Prior to the legislative session of 1933, the government of the State of Washington was supported almost entirely by the taxation of property, real and personal. However, by initiative measure passed by the people at a general election on November 8, 1932, the amount of taxes which might be levied upon real and personal property for state, county, school district and city or town purposes was limited in any one year to forty mills on the dollar of assessed valuation, the assessed valuation being 50% of the true and fair value of such property. (Chapter 4, Laws of Washington for 1933.)

In order to raise additional taxes to take the place of the consequent decrease in taxes on property, the legislature of the State of Washington at its 1933 session enacted an income tax and an occupational tax, the latter, chapter 191, Laws of 1933,

as amended by chapter 57, Laws of 1933, Ex. Sess., p. 157, being the tax involved in the case at bar.

This occupational tax has been repeatedly sustained by the supreme court of the State of Washington as an excise tax levied solely for revenue purposes upon local businesses. Specifically it has been sustained as imposed upon municipal corporations operating utilities and conducting businesses in the nature of private enterprises (similar to the power project involved in the case at bar).

Tacoma v. State Tax Commission, 177 Wash. 604.

The same act was involved in *Rainier National Park Co. v. Henneford*, 182 Wash. 159, 45 Pac. (2d) 617, in which case the court pointed out that the tax was not imposed as a prerequisite to entering into or for the regulation of business, but was solely for revenue purposes. The tax was there sustained as imposed upon the business conducted by the Rainier National Park Co. under a contract with the Federal government. Certiorari was denied by the supreme court of the United States, 56 S. Ct. 307.

The tax is essentially the same as the tax involved in *Pacific Telephone & Telegraph Co. v. Seattle*, 172 Wash. 649, where the supreme court of the state held that the state had the same right to impose a tax upon a local business or the right to do a local business as it had to tax the real and

personal property of a company doing business under a franchise from the Federal government.

In *Pacific Tel. & Tel. Co. v. Tax Commission of the State of Washington*, 56 S. Ct. 522, the supreme court of the United States said with reference to the effect of the same tax on interstate commerce that it did not differ from an *ad valorem* tax upon tangible property used in interstate commerce.

The court also pointed out in this case that where the collection of the tax was being made by an action at law, the tax was not open to objection that some portion of the act might contain penal provisions and provide for extraordinary civil remedies which might be held invalid if sought to be invoked.

Western Union Telegraph Co. v. Massachusetts, 125 U. S. 554;

Nickell v. Dept. of Labor & Industries, 164 Wash. 589.

No contention is made that the state is about to embarrass the performance of a Federal contract. A demand was made for the payment of the tax at the express request of counsel for appellants in order that this suit might be started. But appellants are actually present in the State of Washington and are transacting business in the State of Washington, and are subject to the jurisdiction of the courts of the State of Washington, and the ordinary remedy by suit at law is available to the state, if that should become necessary.

APPELLANTS ARE ENGAGED IN PRIVATE BUSINESS FOR PROFIT, AND ARE THEREFORE NOT ENTITLED TO THE FEDERAL GOVERNMENT'S IMMUNITY FROM STATE TAXATION

Counsel for appellants argue that the tax involved is levied solely on the privilege of building the foundation of the dam for the completed power project for the United States, and that the tax is in effect levied directly on a purchase by the United States.

The supreme court of the State of Washington held otherwise and held that the tax was imposed upon the business conducted by appellants in the same manner as was imposed upon business conducted by other contractors doing work for private parties, the state, or subdivisions thereof. (R. 65.)

In making this contention, counsel ignore the admitted fact that appellants are independent contractors engaged in business for gain, and all of the cases which hold that independent contractors with the government for gain can not claim immunity from taxation by reason of furnishing material or labor to the United States.

The same appellants sought to obtain immunity from the Washington State Compensating Tax in *Silas Mason Co. v. Henneford*, 15 F. Supp. 958, on the ground that in the prosecution of the work they were agencies or instrumentalities of the United

States. The statutory three-judge court in rejecting this contention said, at page 960:

"We think that under the record before us this contention is not well founded, when we are confronted with the facts that the plaintiffs are nothing more than independent contractors performing work and furnishing materials for a definite price which the government has agreed to pay and they have agreed to accept under the contract obtained by competitive bids. *Their relations to the government are contractual; they do not exercise governmental functions, as they only undertook to construct the dam according to plans and specifications, adopted by the government, for a profit to be made in so complying. In no way is the government affected by the fact that they pay or do not pay taxes or that they are a governmental instrumentality.* The cases relied upon by plaintiffs are not applicable to the facts here for we find that most of them are based upon facts where the parties claiming exemption were either agents of the government or engaged as employees or officers of the government in the exercise of governmental functions. The authorities seem to agree that independent contractors with the government for gain cannot claim immunity from taxation by reason of furnishing material or labor to the United States." (Citing cases.) (Italics ours.)

The tax involved in this case (a tax on the privilege of using chattels purchased outside of the state) was sustained as imposed on these same appellants by the supreme court of the United States in *Henneford v. Silas Mason Co., Inc.*, No. 418, October Term, 1936, in an opinion handed down on March 29, 1934.

The argument sought to be made by counsel for

appellants in this case was made with much greater force in the case of *Rainier National Park Co. v. Henneford*, 182 Wash. 159, where an independent contractor was doing business under a contract with the Federal government in the operation of a park permanently owned and maintained by the Federal government, for in the case at bar, the project is presumably a self-liquidating project which may be operated by the state or by a public utility under a franchise from the state and the Federal government. Nevertheless certiorari was denied, 296 U. S. 647.

The supreme court of the state of Oregon has uniformly rejected the contention that independent contractors engaged in the performance of contracts with the Federal government for private gain are in any manner exempt from taxation by virtue of the fact that the contract is with the Federal government.

General Construction Co. v. Fisher, 149 Or. 84, 39 Pac. (2d) 358;

Winston Bros. v. State Tax Commission, 65 Pac. (2d) 7;

Atkinson v. State Tax Commission, 24 Oregon Advance Sheets at page 536.

In *General Construction Co. v. Fisher*, 149 Or. 84, the supreme court of the state of Oregon quoted from *Gromer v. Standard Dredging Co.*, 224 U. S. 362, which it carefully analyzed as sustaining a tax on property owned and operated by a contractor in

improving the harbor of the city of Porto Rico, and pointed out that the principles applied by the supreme court of the United States in the *Gromer* case applied with greater force in the case of a contractor constructing a dam in connection with an irrigation project, inasmuch "* * * the work being done by the federal government, although a governmental function was in the nature of a private enterprise carried on for the benefit of those who would eventually be called upon to pay for it—the settlers on the land embraced within the irrigation project."

The supreme court of Oregon made no distinction between the power of a state to tax the property of an independent contractor and the business of an independent contractor, saying that if the property was taxable, the privilege of using it in performance of the contract would also be taxable.

Six Companies v. De Vinney, 2 Fd. Supp. 693, is one of the earliest cases involving the state taxation of an independent contractor engaged in the performance of a contract with the Federal government for the construction of a dam and power plant. In rejecting the claim of immunity from such taxation, the court said:

"This case and the cases therein cited deal with acts of officers or employees in the exercise of governmental functions, and the cases are unanimous in holding that in so acting they are not subject to the revenue or police laws of a state. *The case of a corporation contractor for the construction of*

public works is one in which, if it may be said to be an instrumentality of the government, its relations to the government are nevertheless purely contractual. It does not exercise governmental functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying. In the case of *Clallam County v. United States*, 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328, the court held that 'the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war,' and said: 'This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account'." (Italics ours.)

To the same effect is *Nevada-California Power Co. v. Ullom*, 3 F. Supp. 934, in which case the company claiming immunity from state taxation was supplying electrical energy needed in the construction of the Hoover Dam.

The court pointed out that the contract was entered into in pursuance of an advertisement for competitive bids for the supplying of the electricity, and that a contractor under such a contract is not such an instrumentality of the government as would relieve it from state and county taxes.

In *Meyer Construction Co. v. Corbett*, 7 F. Supp. 616, the court considered the application of a contractor engaged in the construction of buildings on Hamilton Field maintained by the Federal government as a bombing base. The contractor complained

that it was compelled to pay the sales tax on purchases made by it of materials going into buildings which were being constructed for the Federal government. The court in denying injunctive relief said:

"(1) May the plaintiffs raise the issue that the Retail Sales Tax Act affects the United States of America? *The fact that the plaintiffs have contracts with the United States of America for the construction of certain structures on a government reservation does not constitute the plaintiffs an agency or instrumentality of the United States of America. Therefore, the purchase by the plaintiffs of materials, as set forth, cannot be looked upon as a purchase by the United States of America.* The plaintiffs are not the proper parties to raise the issue that the United States of America will be hampered or impeded by the collection of a sales tax as here set forth. *Trinityfarm Construction Co. v. Alice Lee Grosjean*, 54 S. Ct. 469, 78 L. Ed. 918 (March 5, 1934), and the cases cited therein." (Italics ours.)

In the earlier case of *Thompson v. Pacific Railroad Co.*, 76 U. S. 579, the supreme court of the United States pointed out that the power to tax the property, *business* and persons is original in the states, and is not lost simply because business may be done with the Federal government, at least in the absence of an express prohibition by the Federal government. As authority for this proposition the court referred to *Lane County v. Oregon*, 7 Wall. 77, and *National Bank v. Commonwealth*, 76 U. S. 353.

In *Baltimore Shipbuilding and Drydock Co. v. Baltimore*, 195 U. S. 382, the supreme court in rejecting a claim for immunity from state taxation used the following language which has been repeatedly referred to by the courts with approval:

"* * * But, furthermore, it seems to us extravagant to say that an independent private corporation for gain, created by a state, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time. * * *"

In *Ohio River Contract Co. v. Gordon*, 244 U. S. at page 71, the supreme court of the United States said:

"We at once put out of view the contention that the trial court was without jurisdiction because the parties at the time of the accident were engaged in work under a contract with the United States Government since the want of merit in the proposition has been previously established. *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 371."

These cases from the supreme court of the United States are frequently cited as the leading authorities for the proposition that an independent contractor for gain with the Federal government is not an instrumentality of the Federal government and is not exempt from valid state taxation for any reason on account of the exemption of the Federal government. The principles underlying these cases have never been departed from.

While these cases do not involve excise or privilege taxes imposed in respect to business, courts of

other states have applied these principles in cases where exemption is attempted to be claimed from excise or privilege taxes, and the supreme court in each instance has refused to take jurisdiction for want of a substantial Federal question.

The identical tax was sustained as against an independent contractor performing work under a contract with the Federal government in *Rainier National Park Co. v. Henneford*, 182 Wash. 159, and certiorari was refused by this court. 56 S. Ct. 307.

In *General Construction Co. v. Fisher*, 39 Pac. (2d) 358, an excise tax of the state of Oregon on the privilege of doing business was sustained as imposed upon an independent contractor performing work under a similar contract with the Federal government.

An apppeal from this decision was dismissed for want of a substantial Federal question. (295 U. S. 715.)

In the case of *Ralph Sollitt & Sons Constructing Co. v. Virginia*, 172 S. E. 290, the supreme court of appeals of Virginia observed in passing upon a claim of exclusive jurisdiction in the Federal government that a contractor similar to appellants was "* * * in no sense an instrumentality of the government." An appeal from this case was dismissed for want of a substantial Federal question. (292 U. S. 599.)

It goes without saying if in any of these cases the impeding of a Federal function or the embarrassment of the Federal government in any way were involved in connection with the imposition of an excise tax on an independent contractor in the performance of a contract with the Federal government, that the supreme court of the United States would have taken jurisdiction.

It is submitted, however, that the question has been definitely decided by the supreme court of the United States in *Trinity farm Co. v. Grosjean*, 291 U. S. 466, repeatedly cited in dismissing such appeals.

In dismissing the appeal in the *General Construction Co.* case (79 L. Ed. 1671) the supreme court cited, in addition to the *Grosjean* case, *Metcalf v. Mitchell*, 269 U. S. 514; *Alward v. Johnson*, 282 U. S. 509; *Lucas v. Howard*, 280 U. S. 526, and *Lucas v. Reed*, 281 U. S. 699. Each of these cases turned upon the question of whether or not the person claiming immunity from taxation was an independent contractor or an agency of the state or Federal government, standing for, and, in fact, representing the government. If an independent contractor, there is no immunity from taxation otherwise valid.

In the case of *Trinityfarm Co. v. Grosjean*, 291 U. S. 466, so often relied upon in sustaining valid state taxes as imposed upon independent contrac-

tors doing business with the Federal government, this court held that a state excise tax on gasoline used by an independent contractor in constructing levees in aid of navigation of the Mississippi river under contract with the Federal government was not invalid as a tax on the means or instrumentality of the Federal government.

There, as here, learned counsel relied upon *Gillespie v. Oklahoma*, 257 U. S. 501, and kindred cases (291 U. S. at page 466), and that line of cases headed by *McCulloch v. Maryland*, 4 Wheat. 316 (291 U. S. at page 469). There, as here, it was urged that the contracts are governmental means or instrumentalities.

The supreme court of the United States definitely distinguished these cases and held that such authorities did not apply where, as in the case at bar, an independent contractor for gain attempted to claim the Federal government's immunity from state taxation. The supreme court simply said: "Appellant is an independent contractor. *Casement v. Brown*, 148 U. S. 615, 622. It is not a government instrumentality. *Cf. Metcalf & Eddy v. Mitchell*, 269 U. S. 514. *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279."

An application for rehearing was denied (54 Sup. Ct. 712). The tax on gasoline involved in the *Grosjean* case would have been void if the sale had been made to the government for governmental use. This was decided in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, which decision was followed by

the supreme court of the United States on May 18, 1936, in deciding the case of *Graves v. Texas Co.*, involving an excise tax based upon the withdrawal from storage for sale rather than on the sale.

In the *Grosjean* case and in *Meyer Construction Co. v. Corbett*, 7 Fed. Supp. 616, the tax was applied to an independent contractor and not to the government. That is the distinction. The decision did not rest, as counsel for appellants argue, upon the nature of the tax, but was grounded squarely upon the fact that a tax on a contractor was not a tax on the government or on a governmental instrumentality.

The decision in the *Grosjean* case recognizes that all taxes paid by an independent contractor engaged in the performance of public works under a contract with the government may in some degree be said to affect the government and therefore the court emphasized the fact that if the Federal government was affected at all, the burden was "consequential and remote."

The supreme court of the State of Washington in the opinion appealed from correctly distinguished the cases relied upon by appellant by saying that in those cases "the tax was on the sale to the government and was direct and immediate. Here, the occupation tax is but one of numerous incidental expenses necessarily inhering in the qualification of the contractors to perform the work for the government." (R. 65.)

In deciding the *Grosjean* case (291 U. S. at p. 472) the supreme court said:

"If the payment of state taxes imposed on the property *and operations* of appellant affects the Federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct."

This language applies with peculiar force to appellants, inasmuch as the occupational tax which is a tax on a business or operations simply replaces revenues for the support of the state which were formerly obtained from taxes on property.

One of the many cases involving the converse of the principles laid down in the foregoing cases is *Kreipke v. Commissioner* (C. C. A. 8th Circuit, 1929), 32 Fed. (2d) 594. The case involved a claim for exemption from Federal taxation on the ground that a contractor engaged in the erection and repair of buildings owned by the state of Oklahoma was in some manner entitled to the exemption from Federal taxation enjoyed by the state.

The claimed exemption was denied and the distinction between cases relied upon by counsel for appellants in the case at bar was pointed out. The court observed (32 Fed. (2d)) at page 597:

"* * * It would be a far-fetched doctrine to hold that every person, partnership, or corporation entering into a contract with a state government to do repair work on state buildings or buildings of political subdivisions of the state becomes an instrumentality of the state government and entitled to claim immunity from all federal taxation.

"*Appellant and his partnership were independent contractors and in no way instrumentalities or agencies of the state.* The cases cited by appellant on this point are not applicable to the situation here presented." (Italics ours.)

There appears to be but one decision which would lend some support to the contention of appellants in the case at bar. In *Dravo Contracting Co. v. Fox*, 16 Fed. Supp. 527, which is now on appeal to this court, the court construed a two per cent state gross sales and income tax attempted to be levied by the state of West Virginia by distraint on the property of the contractor to be a tax directly upon the government. The court used the following language in so finding:

"Here we reach the conclusion that the tax is upon the contract, and therefore upon the United States, and not upon the contractor."

And again:

"We are of the opinion that the tax here sought to be collected from the plaintiff is a direct burden upon the United States in contracting with the plaintiff rather than a tax upon the income of the contractor."

In the case at bar there is no attempt to distrain the property of the contractor or to embarrass the Federal government, and the construction of the tax by the supreme court of the state which will be followed by this court is that the tax is upon the local business of the contractor and not upon the government or any of its agencies or upon a sale to the government.

The trial court in the *Dravo Contracting Co.* case reported in 16 F. Supp. 527, appears to have been influenced somewhat in its construction of the tax by the fact that the tax was levied upon gross sales and income rather than upon the net income. In making this distinction the court failed to give due weight to the decision of the supreme court of the United States in *Trinityfarm Co. v. Grosjean*, 291 U. S. 466, where it was pointed out that the immunity of the United States was not affected by questions of degree. The decision is also out of harmony with all other Federal and state decisions.

It is submitted that the supreme court of the State of Washington correctly construed the occupational tax in the case at bar as one upon the contractor and not upon the government or upon a sale to the government, and that, therefore, even under the implication of the *Dravo Contracting Co.* case, the tax is validly imposed upon appellants.

The Work Involved Is Essentially Private in Its Nature Whether Contracts Were Let by the State or Federal Governments

A private company erecting a dam in a navigable river for the purpose of producing and selling power under a license from the Federal government is not an agency or instrumentality of the Federal government so as to be immune from valid state taxation. *Susquehannah Power Co. v. State Tax Commission of Maryland*, 283 U. S. 291.

Nor could such a company claim exemption from a valid state tax on power produced and sold under a Federal license upon the ground that the tax interfered with a Federal function or burdened the Federal government. *Broad River Power Co. v. Query*, 288 U. S. 178.

It follows, therefore, that should the Federal government attempt to utilize the dam being built for power purposes through some agency or instrumentality, that agency or instrumentality would be subject to state taxation as neither the state nor the Federal government can invade the field of private business clothed with immunity from taxation.

Helvering v. Powers, 293 U. S. 214;
Flint v. Stone Tracy Co., 220 U. S. 107.

In *Twin Falls Canal Co. v. Foote*, 192 Fed. 583, the court considered the capacity in which the Federal government participates in these irrigation projects. To quote from page 594:

"(1) *In prosecuting such an enterprise, however, it is not primarily performing a governmental, or, strictly speaking, even a public function, but is promoting proprietary interests.* Such advantage as arises therefrom to the people at large is material and not governmental, and is only such as might indirectly accrue to the public from the reclamation of an equal amount of land through private enterprise. *Kansas v. Colorado*, 206 U. S. 46, 92, 27 Sup. Ct. 655, 51 L. Ed. 956; *United States v. Hanson*, 167 Fed. 881, 93 C. C. A. 371; *United States v. Burley* (C. C.), 172 Fed. 615, *Id.*, 179 Fed. 1, 102 C. C. A. 429."

There can be no question but what the state government has jurisdiction in all matters regarding the appropriation and beneficial use of the waters of the state in connection with the reclamation of arid lands even though the same may be owned by the Federal government.

Twin Falls-Salmon River Land Co. v. Caldwell, 272 Fed. 356. Affirmed 266 U. S. 85;

California-Oregon Power Co. v. Beaver-Portland Cement Co., 295 U. S. 142.

Appellants, of course, would be taxable if the contracts were let by the state government or by a public utility authorized by either the state or the Federal government.

A power project is, of course, strictly private in nature.

A discussion of the cases illustrating the necessity of either the state or Federal government being allowed to tax the other government when that other government enters the field of private business will be found in *People v. Graves*, 283 N. Y. S. 538. In that case the appellate division of the supreme court of New York found that a corporation owned by the government and engaged in the operation of railroads, and so forth, was not engaged in a necessary and essential governmental function so as to render the salary of its general counsel immune from a state income tax.

APPELLANTS ARE DOING BUSINESS IN THE STATE OF WASHINGTON AND SUBJECT TO ALL VALID TAXES LEVIED BY THE STATE OF WASHINGTON

Appellants necessarily use state lands in the performance of their contract.

In *Sollitt & Sons Construction Co. v. Commission of Virginia*, 172 S. E. 290, 91 A. L. R. 774, a foreign corporation entered into a contract with the United States to build a postoffice in Virginia. In performing this contract it was necessary for the contractor to make use of the adjoining streets.

The contention was made in that case, which is hinted at in the case at bar, that the performance of one such contract was not doing business in the state.

In disposing of this contention the Virginia supreme court of appeals said:

"The first contention of the company is that the tax statutes cannot be construed to impose a license tax against the company, for the reason that the company is not transacting the business of a contractor in Virginia. We are unable to concur in that contention. The proof shows conclusively that it is a physical impossibility for the company to execute its contract without that which, in effect, amounts to an appropriation of the state's property to the denial, as a matter of fact, of the right of citizens to its usual and proper use. If, then, the manual execution of the company's contract requires that it be executed in part within the state, in contradistinction to its execution wholly within the confines of government property, then it must follow that the license tax imposed is within the

purview of the statute requiring a license for the privilege of transacting business in this state."

Touching the merits of the claim of immunity, the same court said:

"It has been repeatedly held by the Supreme Court of the United States that the states, when they entered the Union, did not surrender their power to tax federal agencies doing business in the states for personal profit."

In *Nikis v. Commonwealth*, 131 S. E. 236, the same court referred to the state's right to tax the business as on the same plane with the right to tax the property of persons doing the business.

Ohio River Contract Company v. Gordon, 244 U. S. 68, is squarely in point. The company was engaged in performing a contract with the United States to construct a canal with locks and dams.

After disposing summarily of the claim that the state courts were without jurisdiction on the ground that the contract was with the United States, the court said:

"The remaining contentions are also we think without merit. Conceding for the sake of the argument only that the canal reservation was within the exclusive legislative jurisdiction of Congress, it is clear from the facts we have stated that the business carried on by the corporation was not confined to the land owned by the United States, since it is admitted that in order to dispose of the material excavated in the construction of the canal a line of railway was built which extended beyond the reservation and connected with the tracks of the Kentucky and Indiana Terminal Railway, upon whose

property all of the earth and rocks were dumped. This clearly constituted the doing of business within the State and subjected the corporation to the jurisdiction of the Kentucky courts."

In the case at bar the Federal government necessarily occupies a section of state land in connection with this enterprise and appellants actually use a portion of this land. Of course, for a considerable period of time appellants actually maintained their office in the city of Spokane, Washington, from which place their business was conducted.

But the main portion of the work is being done upon the bed of the Columbia river. Inasmuch as the river is navigable, the title to the bed is in the United States subject to a right in the Federal government to use the land for any proper purpose in aid of navigation.

While the Federal government has the right to use the beds of navigable streams, it does not desire to obtain exclusive jurisdiction. It has not attempted to acquire title to the bed of the Columbia river in connection with the Coulee Dam project.

Stockton v. Baltimore, 32 Fed. 9;
United States v. Utah, 283 U. S. 64;
Shively v. Bowlby, 152 U. S. 1;
United States v. Arizona, 295 U. S. 174.

Relying on these cases, the supreme court of the state of Oregon held that contractors building the Bonneville dam across the Columbia river within the state of Oregon were doing business in the

state of Oregon and were subject to an excise tax levied by the state of Oregon.

Atkinson v. State Tax Commission (Feb. 18, 1937, 24 Oregon Advance Sheets 535.

Although appellants in the case at bar have assigned as error the failure of the supreme court of the state to hold that the Federal government has exclusive jurisdiction over the land which it did acquire in connection with the Coulee Dam project, the argument is not developed in this case, but is presented in full in the case of *Ryan v. State Tax Commission*. It is sufficient, therefore, to point out here that no effort whatever was made by the Federal government to acquire title to the soil underneath the Columbia river below ordinary high water mark, and that such portions of land as were purchased by the Federal government are not actually being governed by any branch of the Federal government, nor does the Federal government in any way exercise or claim jurisdiction over the same, that claim being left to the contractors who seek to raise the same for the purpose of avoiding state taxation only.

THE IMPOSITION OF A PRIVILEGE TAX BY A STATE BASED UPON THE GROSS INCOME WITHIN THE STATE OF AN INDEPENDENT CONTRACTOR FOR GAIN WITH THE UNITED STATES DOES NOT CONSTITUTE A DIRECT BURDEN UPON THE OPERATIONS OF THE UNITED STATES

Counsel for appellants attempt to construe the occupational tax instead of being a tax upon the business of contracting conducted for private gain as administered by the state authorities and construed by the supreme court of the State of Washington as a tax on sales to the United States government, and as a direct burden upon that government, because it is based upon gross income rather than net income.

The cases heretofore cited all answer the argument that this tax is a tax upon sale to the United States government. It is what it purports to be and what the supreme court held it to be, a tax on an occupation conducted for private gain which forms but one of many incidental expenses necessary to enable appellants to carry on their contracting business in the State of Washington.

It was a tax which appellants knew they would have to bear in addition to other forms of taxation when appellants placed their bids with the Federal government.

Instead of being a tax on a sale to the government it is a tax which in no way affects the government, for the government has agreed to pay

fixed prices for materials furnished and labor performed under the contract, and will be compelled to pay these prices regardless of whether appellants are compelled to pay state taxes. If appellants are successful in this case in avoiding liability for the Washington business tax, their profits will be increased but the cost of the project to the government will not be lessened in any degree.

This was clearly pointed out by the supreme court of Oregon in *General Construction Co. v. Fisher*, 39 Pac. (2d) 358 (dismissed for want of a substantial Federal question, 295 U. S. 715).

Inasmuch as this tax is a tax to be paid by an independent contractor, it makes no difference to the Federal government whether the tax is measured by net income or gross income. This was clearly pointed out by the supreme court of the United States in *Trinityfarm Construction Co. v. Grosjean*, 291 U. S. 466, where it was contended that contracts similar to the contract in the case at bar were a Federal means or instrumentalities, and where it was argued that the excise tax involved in that case would constitute a burden thereon.

The supreme court of the United States held, however, that the tax was proper and not a burden on the Federal government, and pointed out that where the doctrine of immunity of the Federal government applied, immunity was absolute and was wholly unaffected by matters or distinctions of de-

gree, quoting from *Indian Motorcycle Co. v. United States*, 283 U. S. 570.

In *Commissioner v. Ten Eyck*, 78 Fed. (2d) 515, it was stated that where the immunity from taxation existed it rested upon the entire absence of power to tax.

The point is that the tax is not sought to be imposed on a contract but is on the occupation or business of contracting. It was not imposed upon appellants because they are under contract with the Federal government, but applies to all who engage in the contracting business in the State of Washington. The tax being upon the contractor, there is no room to argue that one form of tax would be a direct burden upon the United States and another form would not.

If in fact the United States was purchasing something, it could not be taxed in any way. There is, however, no room for arguing that the United States government is purchasing anything, inasmuch as it is contemplated that title to the power plant will not rest permanently in the Federal government.

The supreme court of the State of Washington correctly construed the occupational tax as imposed upon appellants as in no sense a tax on the contract or on the Federal government.

APPELLANTS ARE NOT IN A POSITION TO COMPLAIN OF THE TAX INVOLVED IN THIS CASE, THE FEDERAL GOVERNMENT NOT COMPLAINING NOR HAVING COMMISSIONED APPELLANTS TO DO SO

In the case of *State v. Wiles*, 116 Wash. 387, the supreme court of the State of Washington held that one who contracted with the Federal government to carry mail was subject to the motor vehicle license tax imposed by the State of Washington upon the motor vehicle used in the performance of the contract. The supreme court of the state in this case pointed out that there was nothing in the contract with the government which would indicate that the government intended to pass its immunity on to the independent contractor. This being so, the court said: "Under these circumstances it should be presumed that it was the intention that he should be subject to the general laws of the state."

In the case at bar it is not necessary to make this presumption, for the Federal government in every way material to the orderly performance of the contract has required appellants to submit to the jurisdiction of the state and county governments.

Both state and Federal courts in denying similar claims for exemption from state taxation have pointed out that where the Federal government is not complaining, a private party is in no position to do so for the purpose of avoiding taxation.

General Construction Co. v. Fisher, 39 Pac. (2d) 358;

Meyer Construction Co. v. Corbett, 7 F. Supp. 616;

Silas Mason Co. v. Henneford, 15 F. Supp. 958;

Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466.

It must not be forgotten that the moneys allotted to the State of Washington for this project were relief moneys. Moneys, which if otherwise expended within the state for school buildings, etc., would have been constructed under contracts by the state itself. This court in the early case of *Thompson v. Pacific Railroad Co.*, 76 U. S. 579, at page 592 pointed out that such gratuities of the Federal government can not support a claim of immunity from state taxation.

Especially is this so where, as in the case at bar, a private business seeks immunity from state taxation while enjoying the protection of the state for whose very existence the tax is necessary.

CONCLUSION

In conclusion it is respectfully submitted that the Washington occupational tax to which appellants object is what it plainly purports to be, an excise tax imposed on all engaged in the contracting business, and is in no sense a tax on any specific contract nor a burden upon the Federal government or any agency or means thereof, and that the tax was correctly construed and sustained by the supreme court of the State of Washington, whose judgment should be affirmed.

Respectfully submitted,

G. W. HAMILTON,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellees.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 778

DAVID H. RYAN, APPELLANT,

vs.

THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED MARCH 3, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 774

DAVID H. RYAN, APPELLANT,

vs.

THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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[fol. 1]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

No. 15668

DAVID H. RYAN, Plaintiff,

vs.

STATE OF WASHINGTON, Defendant

APPEAL FROM ORDER OF STATE TAX COMMISSION—Filed September 6, 1934

Comes now the plaintiff and appeals to the above entitled court from an order of the Tax Commission of the State of Washington as follows:

I

That plaintiff is a citizen and resident of the State of California.

II

That on or about December 30th, 1933, plaintiff entered into a contract with the United States Government, Department of the Interior, for the performance of certain excavation work within the territorial limits of the State of Washington upon what is generally known as and called the "Coulee Dam Project".

III

That title to all of the land upon which said work was performed by plaintiff under said contract had been acquired by the United States, or was being acquired by condemnation proceedings by the United States, for the sites of locks, dams, keepers' dwellings and other necessary structures required in the improvement of the rivers of this state and necessary for the purposes of the United States Government and the people thereof.

[fol. 2]

IV

That the principal place of business of plaintiff in the State of Washington during the performance of said con-

tract was located entirely upon and within the confines of the lands so acquired and held by the United States, and work performed by plaintiff under the contract with the United States above referred to was a necessary part of the construction by the United States of a dam across the Columbia River with the necessary locks, keepers' dwellings, power houses and other structures and buildings of all kinds necessary for the development of electric energy and irrigation for the use and benefit of the citizens and residents of the United States.

V

That the sole business and occupation and source of income of the plaintiff within the State of Washington since January 1st, 1934, has been from and in connection with the performance of his contract with the United States Government hereinbefore referred to.

VI

That on or about June 4th, 1934, the tax commission of the State of Washington issued its order #1001, assessing plaintiff in the sum of $4012.25 as the amount alleged to be due from him to the State of Washington for and on account of occupation tax and penalties under Chapter 191 of the Laws of 1933 of the State of Washington and amendments thereto, and that on June 11th, 1934, plaintiff made payment of said amount to the State of Washington.

[fol. 3]

VII

That within twenty days after date of the notice of such assessment plaintiff filed his petition in writing with the said Tax Commission of the State of Washington for a hearing upon said order of assessment and for a refund of the total amount so paid and after said hearing and on August 9th, 1934, the said tax commission made and entered its order, denying said petition, a true copy of said order being hereto attached, marked exhibit "A" and made a part hereof.

VIII

That plaintiff denies that said tax of $4012.25, or any part thereof, is or was due and owing by him to the State

of Washington under Chapter 191 of the Laws of 1933 of the State of Washington and amendments thereto, or otherwise, and hereby appeals from the said order of August 9th, 1934, and each and every part thereof, and alleges that said tax so assessed to and paid by him should be abated and the total amount thereof so paid refunded to him for the following reasons:

a. That Section 8326-5 of Remington's Revised Statutes of Washington provides for the exemption from this tax of gross income derived from sales to the United States Government, referring in said Section to subdivision 2f of Section 8326-2, which said subdivision refers to the business of "selling services, professional or otherwise".

That in carrying out of said contract with the United States Government, this plaintiff sublet to others the performance of all of the work required to be done under said contract, and that the proceeds or income received by plaintiff are the results of the sale of his services to the United States in the supervision and planning of the performance of said contract and that such proceeds or income are wholly exempt from said tax.

[fol. 4] b. That said tax is illegal, unconstitutional and void, being contrary to the provisions of the 14th amendment to the Constitution of the United States.

c. That the lands acquired by the United States by purchase and/or condemnation included in the site of the said Coulee Dam Project, under the provisions of Section 8108 of Remington's Revised Statutes of Washington and subdivision 17 of Section 8, Article I of the United States Constitution, are under and within the exclusive jurisdiction of the United States, save for the right to serve civil or criminal process on persons being therein; that every part and parcel of income accruing to plaintiff within the State of Washington since January 1st, 1934 has arisen out of and been derived entirely from services and business rendered and transacted entirely upon the said lands belonging to and/or being acquired by condemnation by the United States, and that the State of Washington has no jurisdiction to assess any tax against the proceeds of any business, occupation or services operated, transacted, rendered or performed thereon.

Wherefore, plaintiff prays that the order of the tax commission of the State of Washington made and entered in this matter on August 9th, 1934 be reversed; that said tax be held illegal and void and that the same be abated, and that the sum of $4012.25 so assessed to and paid by him be ordered refunded to him by the defendant herein, and that he have judgment further against the defendant for his taxable costs and disbursements herein incurred.

Luby & Pearson, Brown & Weller, Attorneys for Plaintiff.

[fol. 5] *Duly sworn to by David H. Ryan. Jurat omitted in printing.*

Copy received 6th day of Sept. 1934. T. S. Hedges, Tax Commissioner.

[File endorsement omitted.]

[fol. 6] IN SUPERIOR COURT OF THURSTON COUNTY

DAVID H. RYAN, Plaintiff,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the Tax Commission of the State of Washington, Defendants

COMPLAINT—Filed October 21, 1935

Comes now the plaintiff and for cause of action against the defendant alleges:

I

That he is now and at all times herein mentioned was a resident and citizen of the state of California.

II

That the above named defendants now are and at all times herein mentioned were the duly appointed, qualified, and acting tax commissioners of the state of Washington.

III

That the United States now is and at all times herein mentioned was engaged in the construction of a dam across the Columbia River at a point in said river where it constitutes the dividing line between Grant County and Okanogan County in the State of Washington; that the said United States has acquired by purchase and/or condemnation title to the necessary lands for the purpose of the construction of said dam and for the sites of keepers' dwellings and other necessary structures required in the improvement of said river and necessary for the development of electric energy and irrigation, for the use and benefit of the citizens and residents of the United States.

[fol. 7] IV

That on or about September 1st, 1934, plaintiff entered into a contract with the United States Government, Department of the Interior, for the construction of a railroad, connecting with the Northern Pacific Railway Company track at Odair, Washington, and running thence to the site of the dam being constructed across the Columbia River hereinbefore referred to.

V

That the sole and necessary purpose for the construction of said railroad by the United States Government is and was for the assistance and use furnished thereby in the construction of said dam and other works appurtenant and necessary thereto and for the beneficial use thereof after said dam and appurtenant works are completed.

VI

That title to all of the lands upon which said railroad construction work was performed by plaintiff under said contract had been acquired for said purpose by purchase by the United States.

VII

That the defendants herein, as the tax commission of the State of Washington, have made demand upon plaintiff that he furnish reports of the amounts received by him from the United States in payments for the performance of said contract, in compliance with Chapter 191 of the Laws of 1933 of the State of Washington and amendments thereto, and Chap. 180 of the Laws of 1935 of the State of Wn., and

have threatened to begin action against plaintiff to recover an occupation tax from plaintiff on account of such receipts by him under said contract, if payment is not made.

VIII

That the lands upon which said contract was performed by plaintiff are not within the jurisdiction of the state of Washington, and that the demand of defendants upon plain-
[fol. 8] tiff for payment of tax on account of moneys received by plaintiff under said contract with the United States Government is without right and contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, plaintiff prays that the defendants herein, as the members of the tax commission of the State of Washington, be perpetually enjoined from assessing and from collecting or attempting to collect from plaintiff any tax based on his receipts from the United States on account of the performance of said contract for the building of said railroad; that plaintiff have judgment against defendants for its taxable costs and such further relief as may be just and equitable herein.

Luby & Pearson, Brown & Weller, Attorneys for Plaintiff.

Duly sworn to by E. D. Weller. Jurat omitted in printing.

[fol. 9] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 16294

DAVID H. RYAN, Plaintiff,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the Tax Commission of the State of Washington, Defendants

ANSWER—Filed October 22, 1935

Come now defendants above named and answering plaintiff's complaint, allege, admit and deny:

I

Deny the allegations contained in paragraph one of plaintiff's complaint and allege that at all times material to the performance of the contract involved in this case and to the prior contract for the removal of the over-burden at the Grand Coulee Dam, plaintiff was a resident of the state of Washington with offices either in Spokane or Coulee City, Washington, from which he conducted the necessary business in the performance of these contracts.

II

Admits the allegations contained in paragraph 2 thereof.

III

Admits the allegations contained in paragraph 3 thereof except that defendants allege that title to all lands necessary for the completed project have not yet been acquired.

IV

Admits the allegations contained in paragraphs 4, 5, 6 and 7 thereof.

[fol. 10]

V

Denies the allegations contained in paragraph 8 thereof.

Wherefore, Having fully answered plaintiff's complaint, defendants pray the same be dismissed and that they have judgment for their costs.

G. W. Hamilton, Attorney General. E. P. Donnelly, Assistant Attorney General.

Duly sworn to by E. P. Donnelly. Jurat omitted in printing.

[fol. 11] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

Statement of Facts—Filed January 6, 1936

Excerpts from the Statement of Facts Line 30, page 7, to line 22, page 22, incl. Line 5, page 49, to line 11, page 60, incl. #26060.

[fol. 12] STIPULATIONS AS TO FACTS

It is stipulated in open court between the attorneys for plaintiffs and attorneys for the State of Washington that the facts in this case are as follows:

That Mr. Ryan, the plaintiff, is and was at all times during the time he was engaged on this contract, a citizen of the state of California and his domicile was there, his legal residence. He was actually in the state of Washington during the performance of the contract, but his legal residence was in California at all those times.

Mr. Donnelly: In an instance like that there might be an additional fact that I would like to put in. Should we do it now as we go along? For instance, in regard to the fact that he maintained his office at Spokane, or shall I state that later?

Mr. Weller: In view of the fact that the law did not go into effect until January 1st and he was actually down there before that time, I don't think that would be material in this case. He was on the ground at all times while this law was in effect.

Mr. Donnelly: It might be material in view of the position we take in the first case.

The Court: Well, I suggest Mr. Donnelly, that you permit counsel to state his facts covered in the stipulation, and if you have any additional facts or you desire to change it in any way, you can take it up afterwards. You can make a note of it as you go along, and it will save confusion.

Mr. Weller: I will state, Your Honor, for the purposes of the record, what I do not consider a necessary fact, that prior to the commencement of actual work under this contract Mr. Ryan had his office in the Davenport Hotel at Spokane, Washington; that he, while there, entered into certain sub-contracts with sub-contractors who actually did the work; that he removed his office to the Dam site where it was upon land acquired by the Government and that is and will be actually used by the Government in this project, [fol. 13] where his office remained during the entire construction work, or excavation work by him, he having moved his office down there about the middle of December, 1933.

That the contract with the Department of the Interior was actually entered into by Mr. Ryan about December 30th, 1933. That the title to all of the land upon which all of the work was performed by the plaintiff under said contract

had been acquired by the United States Government by purchase prior to the commencement of said work by plaintiff or was being acquired by the United States Government by condemnation thereof in the District Court of the United States for the Eastern District of Washington at Spokane, Washington, for a site for the dam across the Columbia River, together with keepers' dwellings, power houses, and other structures and buildings of all kinds necessary for flood control, improvement of navigation, development of electrical energy, and irrigation.

That all of the land on said project upon which the work of the plaintiff was done and performed was above high water mark of the Columbia River and was necessary for and will actually be used by the United States Government in the construction of said project; and that the work performed by plaintiff under said contract with the United States Government was a necessary part of the construction of said project. That during the period of performance of said contract and the receipt of income therefrom by plaintiff, his sole and principal place of business in the state of Washington was located entirely upon and within the confines of the land so acquired and held by the United States, with the exception that he had his office in Spokane until about the middle of December, 1933.

That plaintiff sold merchandise, consisting generally of gasoline, oil, greases, tires, automobile parts and accessories, the income therefrom being included in and part of [fol. 14] the assessment referred to in the notice of appeal and that all of said merchandise was stored, sold, and payment received by plaintiff entirely upon and within the confines of the land so acquired and held by the United States, such sales being made by plaintiff in connection with, but not as a part of, his contract with the United States.

That the sole business, occupation and source of income, of the plaintiff within the state of Washington since January 1st, 1934, until the completion of said contract, has been from and in connection with the performance of this contract with the United States Government, and the sale of merchandise herein used and referred to.

That plaintiff sub-let to others, the performance of all the work provided to be done under said contract. On June 4th, 1934, the Tax Commission of the state of Washington issued its order numbered 1001 assessing plaintiff

in the sum of $4,012.25 as the amount alleged to be due from him to the state of Washington on account of the occupation tax and penalty and that on June 11th, 1934, plaintiff paid said amount to the state of Washington; That within twenty days after date of the notice of said assessment, plaintiff filed a petition in writing with the Tax Commission of the state of Washington for hearing upon the order of assessment asking for a refund of the amount paid by him; and that after the hearing, towit, on August 9th, 1934, the Tax Commission entered its order denying plaintiff's petition for a refund; and thereupon this appeal was taken from that order in accordance with the statute. Now, Mr. Donnelly, do you have some suggestions or changes that you wish to make?

Mr. Donnelly: Yes, Your Honor, in that connection some of the facts which I will want to stipulate, most of them indeed, will go to all three cases, and Mr. Graves has had prepared a map which will dispose of a lot of stipulated facts.

Now, how do you suggest that it will be possible to have the facts stipulated in another case considered in this case? [fol. 15] Mr. Graves: Well, you can just mention at the time the evidence is to be introduced that it is to be used in this case; and if we want to, later on, refer to it, we will adopt that by reference. The reporter can just incorporate the particular piece of evidence in both cases in the record in each of the cases. For instance, if you want to use this map now in this case, why you can use it in this case and we will agree, when it comes to the trial of our case, that it is also to be considered in our case.

The Court: I think that will be very satisfactory.

Mr. Graves: That is just to keep the record straight.

Mr. Donnelly: The defendant State of Washington assumes that the contract and specifications will be introduced in evidence and there will be no objection to that.

Mr. Weller: They will be. The stipulation as read, then, is agreeable to the State, is it, Mr. Donnelly?

Mr. Donnelly: With one exception that I will now mention. The stipulation doesn't refer to the identical contract and the stipulation number 3, or paragraph 3, counsel stipulated that the work was done upon property acquired or being acquired by the United States by condemnation in the District Court of the United States for the Eastern District of Washington at Spokane, where the site of the dam crosses

the Columbia River, together with keepers' dwellings, power houses and other structures and buildings of all kinds necessary for flood control, improvement of navigation, development of electrical energy and irrigation.

Now, Mr. Weller, there seems to be some conclusions in there, and I understand you have a certified copy of an actual petition which will be introduced in evidence.

Mr. Weller: Yes.

Mr. Donnelly: May we not stipulate, rather than have this conclusion, that the condemnation proceedings themselves may be agreed to be typical of all condemnation proceedings over there?

[fol. 16] Mr. Weller: We will so stipulate.

Mr. Donnelly: An argument may turn on some of these keepers' dwellings, railroads and so forth, and we will stipulate to the fact and they will be introduced in evidence as to the condemnation.

Then, with reference to the residence. The contract was performed by Mr. Ryan through sub-letting, sub-letting in two parts, one to M. S. Ross and one to Goodfellow Brothers. Both of those contracts were made at the office of Mr. Ryan in the Davenport Hotel in Spokane.

Mr. Weller: Yes.

Mr Donnelly: And prior to his going to the dam area for the performance.

Mr. Weller: Those two contracts were both executed prior to the 15th of December, 1933, and while Mr. Ryan still maintained his office at the Davenport Hotel in Spokane.

Mr. Donnelly: That after the starting of the work by the said contractors, Mr. Ryan maintained a staff to supervise that work.

Mr. Weller: That is correct.

Mr. Donnelly: At the area; that in accordance with the provisions of the contract he reported the payroll to the Department of Labor and Industries of his employees.

Mr. Weller: That is correct.

Mr. Donnelly: And that he also reported his payroll in connection with his business of selling gasoline and incidentals, personal property.

Mr. Weller: That is true.

Mr. Donnelly: That the tax, the amount of the tax you mentioned, covers the occupational tax on both phases, that is, the performance of the contract and——

Mr. Weller: I had that in my stipulation.

Mr. Donnelly: And on the business of selling.

Mr. Weller: Yes.

Mr. Donnelly: I think, then, that the defendant will stipulate to the stipulation as read by counsel with the corrections [fol. 17] that I have made, or additions.

Now, in addition to that, if the Court please, the defendant wishes to show or wishes to have stipulated with the consent of counsel that the actual performance of the work by the sub-contractors was upon property that had been acquired, I think, actually by condemnation, or was it by purchase?

Mr. Weller: By both.

Mr. Donnelly: By purchase and condemnation from private parties. That the work was above the high water mark of the Columbia River. That is, now, with sole reference to Ryan's first contract, being the removal of the over-burden on both sides of the river.

Mr. Weller: Yes.

Mr. Donnelly: And that the facts stipulated in the MWAK case, they may be stipulated in your case.

Mr. Weller: I think probably that would be the better way.

Mr. Donnelly: I may say to the Court that later in the stipulation the nature of the contract and the actual conditions will appear and such portions as we wish to be considered in the one case will be referred to. That will be with reference to the first contract.

Mr. Weller: Yes.

Mr. Donnelly: With the exception of such facts as we will stipulate later.

Mr. Weller: It probably will appear, if the Court please, that there may be additional facts as the case develops that it will be necessary to stipulate into the record, but I think there will be no dispute among counsel as to the facts. I have a little documentary evidence that I desire to introduce. First, plaintiff's identification A in cause 15668. Plaintiff's exhibit A is a copy of the contract and specifications and bond between Mr. Ryan and the Government in this case.

Mr. Donnelly: I have no objection to that.

[fol. 18] The Court: It may be admitted.

(Copy of contract and specifications and bond between plaintiff Ryan and the Government marked Plaintiff's A in cause 15668.)

Mr. Weller: Plaintiff's exhibit B is a certified copy from the Federal Court at Spokane, Washington, of a complaint and a declaration of taking and an order of taking in one of the condemnation suits of the land involved in this controversy. It is an order of possession instead of an order of taking.

Mr. Donnelly: We will stipulate that is typical of the procedure brought by the Government.

Mr. Weller: I will say to the Court there were a number of such condemnation suits and that the form of all the papers as certified there were the same in all cases. The same general form was followed.

The Court: It may be admitted.

(Certified copy from Federal Court in Spokane of the complaint and order of possession admitted and marked plaintiff's exhibit B in cause 15668.)

Mr. Graves: Mr. Reporter, please make a note there that the plaintiff in cause 15850, Silas Mason Company versus Tax Commission, will desire to have that exhibit incorporated in the record in their case. That was the last one only, the condemnation proceedings. I don't care anything about the contract with Ryan.

Mr. Donnelly: It may be stipulated that that is typical of the condemnation proceedings through the whole project.

Mr. Graves: Yes.

Mr. Weller: I think possibly I should offer to read into the record the act of Congress relating to rivers and harbors. It might not be accessible to the Court.

Mr. Graves: Well, just pass it up to the Court for his use. That will be all that is necessary.

[fol. 19] Mr. Weller: This is a copy of the Act relating to the approval of the dam site.

The Court: I presume it is for the Court's convenience in connection with your brief.

Mr. Weller: Yes, Your Honor. Now, I think that is our case in chief, Mr. Donnelly, and we rest.

Mr. Donnelly: With the exception of such facts as we may wish to incorporate in this case in subsequent stipulations, the State will rest.

Mr. Weller: Do you want to take your case up now, Mr. Graves.

Mr. Graves: Well, let us get the evidence in and then argue it all together.

Mr. Weller: Well, I mean the evidence.

Mr. Graves: I will have some evidence on our part of the case.

Mr. Weller: Probably I had better go ahead with the railroad case.

[fol. 20] Mr. Weller: This evidence now will be introduced in the case of Ryan versus the Tax Commission, number 16294. This is the copy of the contract and specifications and bond in the railroad construction case.

Mr. Donnelly: We will have no objection.

The Court: It may be admitted as Plaintiff's exhibit A, in this, cause number 16294.

(Copy of contract, specifications and bond admitted and marked Plaintiff's exhibit A in cause No. 16294.)

Mr. Weller: We shall also ask to have admitted in this case the certified copy of the condemnation proceedings because, if the Court please, this case necessarily depends upon the other. In other words, if we fail in the other case, naturally this would fall also.

The Court: It may be understood, then, that plaintiff's exhibit B in the former case is an exhibit in this case.

Mr. Weller: Yes, Your Honor.

(Certified copy of condemnation proceedings admitted in evidence and to be marked Plaintiff's exhibit B in cause No. 16294.)

Mr. Weller: I think that is all, Your Honor.

Mr. Donnelly: Now, have you checked the Complaint in the railroad case? I don't know, as a matter of fact; I presume they contain the same allegations of authority that they did in the first one.

Mr. Weller: Yes. We haven't stipulated in this railroad case yet, have we?

Mr. Donnelly: Well, I suggest that any extra stipulation you make now—— (interrupted)

Mr. Weller: Well, it will be stipulated between counsel for Plaintiff and for the Defendants in this case, number 16294, the same stipulation that was contained in cause

[fol. 21] number 15668; and in addition thereto the following:

That about September 1st, 1934, plaintiff entered into a contract with the United States Government, Department of the Interior, for the construction of a railroad connecting with the Northern Pacific Railway Company tracks at Odair, Washington, running thence to the site of the Grand Coulee Dam;

That the sole and necessary purpose for the construction of said railroad by the United States Government is and was for the assistance and use furnished thereby and in the construction of said dam and other works appurtenant and necessary thereto and for the beneficial use thereof after said dam and appurtenant works are completed; That the title to all of the lands upon which said railroad construction work was performed by plaintiff under said contract had been acquired for said purpose by purchase and/or condemnation by the United States Government and that the entire performance of said contract by plaintiff was had upon said lands so acquired.

That the plaintiff had his office upon lands other than those belonging to the United States Government acquired for the purpose of this railroad at the beginning of the construction of the railroad and later, possibly when the contract was about half done, he moved his office and living quarters, which were together, to the dam site where they were upon lands acquired by the Government for the purpose of the dam and the railroad.

That the defendants, the Tax Commission of the State of Washington, have made demand upon plaintiff that he furnish reports of the amounts received by him from the United States in payment of the performance of said contract under the occupation tax laws and have threatened to begin action to recover the tax.

[fol. 22] Now, is there anything further, Mr. Donnelly?

Mr. Donnelly: It will be stipulated also in that case that Mr. Ryan, in the performance of the contract, made the reports to the Department of Labor and Industries?

Mr. Weller: Yes, he did. I might state that he performed this contract himself and made his regular reports to the State of Washington, to the Department of Labor and Industries, and paid the premiums therefor.

Mr. Donnelly: And that the sub-contractors, such as they were, did the same thing.

Mr. Weller: Well, I think there were no sub-contracts in this case at all.

Mr. Donnelly: The conclusion that the entire performance of the contract by the plaintiff was had upon such lands so acquired, it will be stipulated to, and that the actual performance of the actual manual labor was done upon the right of way of a certain width that was either purchased or condemned by the Federal Government.

Mr. Weller: That is true.

Mr. Donnelly: The State maintains, however, that it would have been impossible to perform the contract entirely there and this will be shown by certain terms of it. In that connection it will claim that the office and supervision, the necessary supervision from the office, will be a part of the performance.

Mr. Weller: At the time the contract was actually let, Mr. Ryan's office was at the dam site and when that work was finished, and before he commenced the railroad construction, he removed his office to Coulee City where it was maintained for about half the performance of the railroad contract and then moved back to the dam site upon Government land.

[fol. 23] Mr. Donnelly: It will be stipulated that the railroad was completed for the dam purposes as now being operated by the MWAK Company in that connection?

Mr. Weller: Well, that is part of Mr. Graves' case rather than ours.

Mr. Donnelly: And that the right of way for the railroad is approximately thirty miles in length and is not shown upon the map which will be introduced in evidence in the MWAK Company case.

Mr. Weller: That is correct.

Mr. Donnelly: It is stipulated the Government did furnish it in accordance with the terms of the contract and, with one exception, the title has been acquired.

Mr. Weller: And that is being condemned.

Mr. Donnelly: The right of possession has been granted.

Mr. Weller: Yes, that is correct.

Mr. Donnelly: The allegation, Mr. Weller, that will be stipulated to that suit is about to be commenced, that is, it is understood to the extent if we make a demand in the

course of this action, the ordinary process of the court will be invoked against him; that is what you mean, is it?

Mr. Weller: Yes, and this action is brought for an injunction to prevent that.

Mr. Donnelly: Yes. In the first Ryan case, Mr. Weller, for what it is worth, will you stipulate that Mr. Ryan has sub-let the contract to Mrs. Paine or entered into some negotiations for that and that a lawsuit in the Superior Court of Spokane County was brought by Mrs. Paine for the damages which were recovered in that court?

Mr. Weller: That is true. I don't think it is material.

Mr. Donnelly: And that this was done from the office in the Devenport Hotel.

[fol. 24] Mr. Weller: Yes, that is correct. I don't think it is material at all, Mr. Donnelly.

Mr. Donnelly: Our position is that he was doing his work by subletting.

Mr. Weller: Yes, that is true.

Mr. Donnelly: Then, in the railroad case, we will call it, the State will rest with the addition of such facts as will be disclosed by the later stipulation.

Excerpt from the statement of facts, beginning at line 30, page 7, to line 22, page 22, inclusive.

Mr. Donnelly: Now, Mr. Graves, there is a slight change that you know of in the contract. Now, is it material?

Mr. Graves: I don't consider it material. If you wanted to get that properly, you would have to have an engineer testify.

Mr. Donnelly: The fact is that the original dam was let as a power project and the specifications of the MWAK contract were changed recently to lower and widen it, so that it is, in fact, a base for the ultimate higher dam which will be an irrigation project.

Mr. Graves: Yes, the Government reserved the right to make such changes as it desired in the contract, subject to adjustment.

Mr. Donnelly: Yes. The principal thing the State would like to stipulate with reference to the plaintiff MWAK exhibit C, the map and letter, will you correct me if I say anything wrong, Mr. Graves?

[fol. 25] Mr. Graves: Yes.

Mr. Donnelly: It will be stipulated that the map introduced in evidence as a part of exhibit C is correct, and that it correctly shows property acquired by the Federal Government for the work in progress. There is, however, no established reservation as such, either by the Secretary of the Interior or by Act of Congress and no plat with definite boundaries filed. The map shows the extent of the land acquired now in the vicinity of the dam itself.

In addition to this there is being acquired flowage lands above the dame on both sides of the river by the Federal Government. It is in the process of being acquired and a large lake for reservoir purposes will be made to the north, and, in that process, a great many thousand acres of land will be necessary, that is, for the ultimate project. That in this ultimate project there will be public land, probably largely privately owned land, some state and county lands, and some school lands. That the irrigation project, if and when completed, will involve a great many acres they refer to in their report to the south, but that is not being acquired at the present time. That there is contemplated to be acquired in the immediate vicinity of the property shown on the map, exhibit C, land for the power plant, That has not yet been acquired.

The tract of land numbered 4, Your Honor, and the letter which is part of exhibit C, exhibit C refers to Section 36 and in the letter it is described as section 36. Erroneously on the plat it is apparently 35. That should be and is section 36 and is a school section, section 36 being a school section of land.

The Court: It is described as 36 and marked 35 on the map?

Mr. Donnelly: 36 is correct, and in that connection, Your Honor, the engineers said it was reserved to the United States for the state of Washington under section 3380 of [fol. 26] Pierce's Code. We use Remington's mostly, 7410 and 7412. That is a matter of law, I suppose.

The two orange tracts I would like to have understood their nature, in case it becomes material. I think it may make some difference in our theory. They are described by the engineer as "tribal" lands. In that connection there has been at that point, at the very point of the dam, the Colville Indian Reservation. Is that correct?

Mr. Graves: I don't know.

Mr. Donnelly: The Colville Indian Reservation does not run there, I understand. That might make some difference in the title to the thread of the stream.

Mr. Graves: I think the Colville Indian Reservation is further down the stream.

Mr. Donnelly: Well, then it will be stipulated that the Indian Reservation does not affect any of the land on the map, exhibit C.

Mr. Graves: That is correct.

Mr. Donnelly: That the area described as "tribal" lands and shown on the map and colored in orange, the title is in the Federal Government for the Indians in some form or in the tribes.

Mr. Weller: Well, I don't know; that doesn't affect our case and I haven't investigated, so I couldn't say.

Mr. Donnelly: And that the Columbia River at that point is a navigable river.

Mr. Graves: Yes.

Mr. Donnelly: And that there are no conveyances directly from the state to the Federal Government except the reservation as to section 36, the school section.

Mr. Graves: I want to answer that with respect to the statement as to the acquisition of other lands, flowage rights and so forth.

[fol. 27] It is agreed that the land within the heavy boundaries here is all that is essential for the work that has been done and that is contemplated to be done in the near future. The flowage rights and any question involving other structures will be something arising in the future and are not involved in the present situation.

Mr. Luby: As a matter of fact, the engineers' notes produced in 1929 show that this additional acquisition of property and the building of other dams shall extend to the year 2000, so we can't speculate about that today.

Mr. Graves: I just wanted to be sure that in the present case all that is involved in the present case is within these boundaries.

Mr. Donnelly: I believe that is a little indefinite. I think we should stipulate to the facts, the land, that is, flowage lands and lands to create the pond are being acquired at the present time as the work progresses. The land is being acquired that is necessary.

Mr. Graves: Yes, that will be agreed. The United States is getting lands as it is necessary for its construction.

Mr. Donnelly: That the land to make the project feasible as a power project is now being acquired and a great deal of land in addition to what is shown on exhibit C has been acquired. Those are the facts.

Mr. Graves: Well, that is immaterial as we regard it, but the fact is as stated.

The Court: I don't see how it could have any bearing on the present inquiry, Mr. Donnelly.

[fol. 28] Mr. Donnelly: I wish to make the point that no definite reservation has been established on plat——

Mr. Graves: You understand, Mr. Donnelly, that the changes in this contract do away with the dam feature and make it merely a foundation for the high dam.

Mr. Donnelly: Yes, that is why I suggested you might want to stipulate that.

Mr. Graves: Well, that can be stipulated. That is the fact. The changes that are made do away with the construction of the dam that was contemplated by the original contract and provide for the construction of an enormous base which will sustain the high dam which it is contemplated will be ultimately erected and providing for the irrigation of all the big bend section.

The Court: We are only concerned now with the contract for building this foundation, as I understand it.

Mr. Graves: Yes, Your Honor.

Mr. Weller: It will also be stipulated that this change in the MWAK contract was made after the completion of the contract or contracts with Mr. Ryan. Is that correct, Mr. Donnelly?

Mr. Donnelly: I believe, after the completion of the railroad contract, yes.

Mr. Graves: What is to be constructed under this change is a part of a dam for the purposes defined in the specifications.

Mr. Donnelly: And we wish it specifically understood the land in section 36 colored in purple is being used by the contractor in the performance of this contract in the manner described. It will be stipulated that there are two regularly formed school districts in the area, one in the engineer's town and one in Mason City, under the laws of the state of Washington.

Mr. Graves: I didn't quite understand your statement, Mr. Donnelly.

Mr. Donnelly: I said it will be stipulated that there are [fol. 29] two regularly formed school districts in the area under the laws of the state of Washington, one in the government engineers' camp and one in Mason City.

Mr. Graves: Well, I don't see that it is material, but there will be no disposition to get away from that, Mr. Donnelly. I just wanted to inquire about the facts. You say there are two districts formed within these heavily marked lines?

Mr. Donnelly: Yes.

Mr. Graves: Subject to the objection as to its materiality, that is the fact.

Mr. Luby: Our contention is that it is immaterial, but probably it had better go in and if it becomes material, why, it will be in there.

Mr. Donnelly: I am advised by Mr. Schwellenbach that the district that is in the engineers' camp was established under the Bureau of Reclamation; that it required dissolution of a joint district and that this was done upon the petition of the Bureau; and that the actual status at the area,—Mason City, of course, is on this area—and it is built by the contractors as part of their contract.

Mr. Graves: The engineers' camp—may we not explain to the Court what that is?

Mr. Donnelly: Yes.

Mr. Graves: That is the camp that is maintained by the United States for the offices and residences of the officers of the United States, the engineers who are employed there, and it is entirely separate and distinct from the town of the contractors which is called Mason City. It is on the opp-site side of the river. So when engineer's camp is referred to it is understood to mean the land which is occupied by employees of the United States as distinguished from the contractors and their employees.

Mr. Donnelly: Now, I would like to stipulate as to the extent in which the counties involved actually participate [fol. 30] in the government of that area, for what materiality it may have. It will have some on our theory of the case and Mr. Schwellenbach is more familiar with that; maybe he could state it better than I.

Mr. Schwellenbach: That in Mason City the policemen who are employed by the Mason Company have been depu-

tized as deputy shariffs of Okanogan County; that Mr. Mallock, the attorney for the Mason Company located at Mason City, has been appointed a Justice of the Peace in Okanogan County; that Dr. Sorenson, one of the doctors in the Mason Hospital, has been appointed as a deputy coroner in Okanogan County; that prior to the enactment of the Steele law, a number of beer parlors were operating in this area in Grant County under permits issued by the county commissioners of Grant County; and that in the fall of 1933 one of these operators was fined in Justice Court for operating without a permit as provided in the ordinance; that on Christmas Eve of 1933 the sheriff and prosecutor of Grant County were called to the dam site on the complaint of one of the beer parlor operators and on the following day the man was brought into the Justice Court and convicted of assault in connection with this particular fight; that on January 26th, 1934, the sheriff of Grant County was called to the dam site on the complaint that an insane man was at large there. That is, I want it understood this is all within this area which is in controversy here.

That in November, 1934, the sheriff was called to the dam site in this area to investigate the theft of some water taps in the possession of a sub-contractor operating on this property; that about the same time the prosecutor was called there as coroner to investigate the accidental death of a man killed while working for Priek and Kinney, contractors, who were building the railroad highway on this property; that a man named Louis Kroll is operating a beer parlor right down on the river in this area and has been selling beer under a license issued to him by the Liquor [fol. 31] Control Board of the State of Washington; that at various times the coroner of Grant County has been called down to this area to investigate the accidental death of men who were employed by the contractors on this particular area.

Mr. Donnelly: You are the coroner?

Mr. Schsellenbach: Yes, in this particular area.

The Court: You are asking to have those facts stipulated?

Mr. Schwellenbach: Yes, Your Honor.

The Court: Do I understand they are agreed to, subject to their materiality?

Mr. Luby: Subject to raising that question at any time as to materiality.

Mr. Graves: I have no doubt in that country they rustle around considerably.

Mr. Donnelly: I would like to have it stipulated that the MWAK Company have regularly made applications to the Director of Licenses for the state of Washington for refund of the gasoline tax paid in the area on the grounds, among others, of operating trucks illegal for use on the highway and that they are over eight feet in width; and that, under the law as construed prior to the going into effect of the 1935 Act, refunds were regularly made to the MWAK of such gasoline taxes as were paid as were used in the machinery on the dam and trucks that were too large to operate on the highway.

Mr. Graves: Subject to the objection that it is immaterial, the facts are admitted.

Mr. Donnelly: That prior to the construction of the railroad from Odair to the dam site the contractors transported the materials by truck of such proportions that a special permit was required to operate on the public highway; and that such special permits were granted by the state authorities.

Mr. Graves: Subject to materiality, that is admitted.

[fol. 32] Mr. Donnelly: That there are two private corporations in Mason City, the Coulee Trading Company and the Mason City Company, which transact private business; which is the hotel and moving picture theatres and gasoline distributors and general merchandise business. That, as to private parties in Mason City, the appropriate state tax was collected and paid to the state, sales tax, admission tax, and that no sales tax is, in fact, collected on sales by this company to the Mason-Walsh Company in that area;

That the Mason-Walsh Company, operating its mess hall, collects the tax itself and pays it to the state on meals sold to other than employees of the company;

That the Mason-Walsh-Atkinson Company—I am not sure whether counsel has stated it—is qualified to do business in the state. They have qualified to do business in the state of Washington.

Mr. Graves: I think that is pleaded. All of this goes in subject to our objection as immaterial. The facts are agreed where we do not dissent.

Mr. Donnelly: Yes, I understand also that a great amount of this may be inadmissible that is in evidence already.

Mr. Graves: Yes.

The Court: Well, these questions will be raised at the time of the argument, no doubt, and considered by the Court.

Mr. Donnelly: Now, if the Court please, as to the amount of the evidence which Mr. Graves and I have stipulated I understand may be used in the Ryan cases. Under our theory of the case the state feels that the character of the reservation is in issue and we would like the stipulation as to the map to be a part of that and that the letter accompanying it and those stipulations be made a part of the Ryan case.

Mr. Weller: That may be done.

[fol. 33] Mr. Donnelly: Would there be anything wrong with stipulating so far as material in the MWAK case that the stipulations may apply in the Ryan case?

Mr. Weller: Well, the question in regard to that would be in the making up of the record, Mr. Donnelly. So far as the stipulations with Mr. Graves are concerned, I know that a good many of them are true and I don't question the truth of any of them; but a lot of them are not applicable to our cases. It might be rather difficult to make up the record unless we should stipulate that certain of those should apply in our cases.

Mr. Donnelly: Well, I went along here each time without calling attention to what cases, Mr. Weller.

Mr. Weller: It is agreeable to us that any of the matters which have been stipulated here which are applicable to the Ryan cases may be used in those cases. The only thing would be the difficulty of segregation.

Mr. Donnelly: Well, in general, we wish to show the area, the nature of the area, the map and the way it is actually used now.

Mr. Weller: So far as the map is concerned, that is perfectly agreeable to us; but, as Mr. Luby suggested, so many of the things which have been mentioned here happened after Mr. Ryan had completed his two contracts they could not affect him in any way.

Mr. Graves: As you introduced the evidence in the other cases, as we went along, I stated that I wanted included in this case, something that went into the Ryan case, I noted that.

Mr. Donnelly: Well, I believe if the State offers a daily transcript here of what has happened, that we can get at it later.

Mr. Weller: Yes.
Mr. Donnelly: And rest on the stipulation now as made.
Mr. Weller: That is satisfactory.

Excerpt from the Statement of Facts, Line 5, page 49 to Line 11, page 60, inclusive.

[fol. 34] 26060

EXCERPT FROM EXHIBIT "B"—DECLARATION OF TAKING

that said land is taken under the authority of the constitution and laws of the United States for the following purposes:

(1) Regulation and control of the flow of the Columbia River, a navigable stream of the United States, by means of a dam located at the Grand Coulee site and a storage reservoir above said site for use at said Grand Coulee site and at all the dam sites on the Columbia River below said Grand Coulee and all parts of said Columbia River from the Canadian Line to the mouth of said stream for the following purposes:

(2) Improvement of navigation;

(3) Flood control;

(4) Hydro-electric power development at said Grand Coulee site and at each of the proposed dam sites below the said Grand Coulee site as an aid and incident to the other purposes herein enumerated, including the increase of the amount of firm power which may be made available at each of the lower dam sites on said stream and the improvement of the feasibility of each of said proposed lower dams on the Columbia River as self-liquidating projects;

(5) Reclamation of arid and semi-arid land, including public land of the United States;

(6) Domestic use of water, including domestic use by entry-men on public lands;

(7) Relief of unemployment under the provisions of the Act of Congress of June 16, 1933 (48 Stat. 195) and particularly under Title II thereof.

Filed in the U. S. District Court, Eastern Dist. of Washington Jun 18, 1934, A. A. LaFramboise, Clerk, Eva. M. Hardin, Deputy.

Filed in Clerk's Office Supreme Court State of Washington Jan 13 1936 Benj. T. Hart Clerk, By Archie B. Stewart, Deputy.

Filed Superior Court Thurston Co. Wash. Oct 22 4:32 PM 1935 Ellis C. Ayer, Clerk by B. Chambers, Deputy.

Plaintiff's Exhibit No. b Thurston County Cause No 15668. Date Admitted Oct 22/35 also Ex B in 16294.

[fol. 35] 26060

EXCERPT FROM EXHIBIT "A"

Article 21 of Exhibit "A"

Art. 21. Compensation Insurance.—The contractor will furnish compensation insurance for employees on this work and comply with the workmen's compensation laws of the State, Territory, or district in which the work is to be performed, and will give proof of such adequate insurance satisfactory to the contracting officer.

Plaintiff's Exhibit No. A. Thurston County Cause No. 15668.

Date Admitted Oct. 22/35.

Filed Superior Court Thurston Co. Wash. Oct. 22, 4:32 P. M. 1935. Ellis C. Ayer, Clerk, by B. Chambers, Deputy.

[fol. 36] EXHIBIT "7"

(P. O. Draft; Oct. 20, 1933.)

United States

Department of the Interior

Bureau of Reclamation

Grand Coulee Project, Washington

Contract Between the United States of America and the State of Washington Acting Through the Columbia Basin Commission

This Agreement, made this first day of November, 1933, in pursuance of the act of June 17, 1902, (32 Stat., 388) and

acts amendatory thereof or supplementary thereto, referred to herein as the Reclamation Laws, and of the act of June 16, 1933 (48 Stat., 125) commonly known as the National Industrial Recovery Act, between the United States of America, represented by the Secretary of the Interior, and the State of Washington, represented by that certain agency of the said state known as the Columbia Basin Commission, created under Chapter 81 of the 1933 Washington Laws.

Witnesseth that:

2. Whereas brevity is desirable, the following are hereinafter styled as listed in Column I hereof, in lieu of the full name or title listed in column 2 hereof:

Column I	Column 2
United States	United States of America
Secretary	Secretary of the Interior
NIRA	National Industrial Recovery Act
State	State of Washington
Commission	Columbia Basin Commission
Project	Grand Coulee Project

and

3. Whereas, an allotment of $63,000,000 out of the fund appropriated under the NIRA has been made available for [fol. 37] the construction of a dam and power plant by the Reclamation Bureau at the Grand Coulee site on the Columbia River in the said state and such transmission lines in connection therewith as may be found necessary or desirable;

4. Whereas, the said dam to be constructed with said allotment constitutes the first unit and an integral part of a larger Grand Coulee Dam which is more fully described in the reports of the Chief of Engineers of the War Department and the Reclamation Bureau as set out and discussed in the "Hearings before the Committee on Irrigation and Reclamation of the House of Representatives of the Seventy-second Congress on the Columbia Basin Project, H. R. 7446", which said dam will provide about 5,000,000 acre-feet of storage capacity, create a lake 151 miles long extending from the Grand Coulee to the Canadian line, and serve as the diversion dam for said project and for improvement of navigation, flood control, power development, and ulti-

mately for irrigation, including the irrigation of public lands of the United States; and

5. Whereas, under appropr*o*ation made for that purpose by Congress, the Corps of Engineers, United States Army, have conducted exhaustive investigations of the Columbia River for the purpose of determining the best use of the said stream and its tributaries for the various purposes to which it is adapted, and have adopted a comprehensive and coordinate plan for the development and use of said stream for navigation, flood control and irrigation and for the development of electrical energy to pay the cost of the proposed construction and for irrigation pumping and industrial and domestic use; and

6. Whereas, the said comprehensive plan for the coordinated development of the Columbia River for navigation, flood control, power and irrigation includes the construction of a series of dams at various points on the Columbia River, [fol. 38] the uppermost of which is the said Grand Coulee Dam; and

7. Whereas, the said Grand Coulee Dam is the key structure in the comprehensive plan for the coordinated development of the said stream, in that the said Grand Coulee Dam will provide the necessary storage capacity to store the peaks of the Columbia River floods and, by storing the floods and releasing the stored water during the low water season, will improve the flow of said stream for navigation, power development and irrigation and will reduce the flood dangers on the lower part of the stream; and

8. Whereas, it is estimated that the storage to be made available behind the said Grand Coulee dam will about double the amount of firm power which can be developed at each of the proposed dam sites between the Grand Coulee and the mouth of the Snake River and will increase by about 50% the amount of firm power than can be developed at each of the several dam sites below the mouth of the Snake; and

9. Whereas, the said increased amount of firm power made possible at each of said lower dams by reason of the storage behind the Grand Coulee dam is an important factor in the feasibility of each of said lower dams as a self-liquidating project; and

10. Whereas, the said Commission has been created by the Legislature of said state as a state agency for the purpose of cooperation with the federal government in securing the construction of the said project and the said Grand Coulee dam;

Now, Therefore, it is hereby agreed:

11. Construction of First Unit.—Upon approval of the plans and specifications for the said proposed first unit dam of the project by the chief engineer of the reclamation bureau, the United States acting through the Reclamation [fol. 39] Bureau and under the direction of the secretary will expend the sum of sixty million dollars ($60,000,000) or so much thereof as the secretary shall find to be necessary for that purpose, in the construction of a dam and power plant at the said Grand Coulee site, the top of which dam will be approximately at elevation 1116, and spillway crest thereof, at approximately elevation 1085 feet above sea level, and will expend the sum of three million dollars ($3,000,000) or so much thereof as the secretary shall find to be necessary or advisable in the construction of transmission lines for marketing of the electrical energy to be produced at said dam.

12. Title to Constructed Works.—The United States will retain the title to the said dam and power plant and the operation and control thereof until the cost of the said project, including the cost of the said first unit dam and power plant, has been fully repaid into the treasury of the United States.

13. Commission to Act in Advisory Capacity.—The Commission will act as an advisory board representing the state in an advisory capacity in conferences with officers of the United States concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines.

14. Option to State.—The State, acting through the said Commission, or other duly authorized state agency, shall have an option, for a period of three and one-half (3 1/2) years from the date hereof, to purchase the perpetual right to the entire power output of the said first unit dam and power plant by issuing and delivering to the United States

valid general obligation bonds of the state in the amount of seventy per cent (70%) of the estimated cost of the said first unit dam, power plant and transmission lines as the said cost is estimated and announced by the secretary in the [fol. 40] manner hereinafter provided, subject, however, to the following terms, conditions and reservations. The principal of the said bonds shall come due in not to exceed 30 years and shall bear interest at the rate of four per cent (4%) per annum. It is further agreed that for a period of five years after the expiration of said three and one-half (3 1/2) years option period, the state shall have a further and additional option to purchase the said perpetual right to the entire power output of said first unit dam and power plant at the same price and upon the same terms and conditions applicable to said 3 1/2 year option; but subject to the additional condition, that if the state should exercise the option after the expiration of said 3 1/2 year period, then the state will take said power rights subject to any contracts for the sale of power from said plant which the United States may have made prior to the exercise of the option by the state and the rights, benefits, duties and obligations of the United States under such previously made power sale contracts shall inure to the benefit of and be binding upon the state as the successor of the United States thereunder.

15. Estimate of Cost of First Unit.—When the Commission shall have advised the secretary that the necessary legal authority has been secured to issue and deliver the said bonds and that the state desires to exercise the option provided for herein, the secretary will furnish the commission an estimate of the cost of the said first unit dam and power plant and the transmission lines to be constructed in connection therewith, based upon the costs theretofore plus an estimate of the cost of completing the said works, which statement and estimate of cost shall include all expenditures of whatsoever kind in connection with, growing out of, or resulting from the work described, including the cost of labor, material, equipment, engineering and legal work, superintendence, administration and overhead, right of way, [fol. 41] property, and damage of all kinds, and shall include all sums expended by the United States in surveys and investigations, both prior to and after the execution of this contract, the said estimate shall be in writing, duly signed

by the secretary, and shall be conclusive for the purpose of the option provided for herein.

16. Enlargement, Alteration, or Improvement of Works.—The United States reserves the right to enlarge, alter and improve the said first unit dam and to enlarge, alter, improve and modify the said power plant and to change the machinery therein to adapt the same to the higher head available from such enlarged dam, and to add other or additional power plants or power units, and the right to use the enlarged dam and the enlarged or modified power plant in connection therewith for all the purposes for which said larger dam is intended, including improvement of navigation, flood control, power development, and irrigation.

17. Right to Seasonal Power.—The United States reserves the right to such part of the seasonal power available from said enlarged dam during the irrigation season as way be needed for pumping water for the said project.

18. Estimate of Available Power.—In connection with the said estimate of cost to be furnished by the secretary, the secretary will also furnish as estimate of the amount of firm power and the amount of seasonal power which may reasonably be expected from said first unit dam and power plant, and after the construction of the enlarged dam and the improved or enlarged power plant the United States retains the right to all power or electrical energy which can be developed at said enlarged dam and power plant in excess of said estimate of power available from said first unit dam and power plant and after said enlargement the power rights of the state will be limited to the said estimated power output estimated to be available from said first unit [fol. 42] dam and power plant; but it is agreed and understood that enough of the seasonal power available from said enlarged dam and power plant during the irrigation season to supply the pumping requirements of the project is reserved by the United States even though such reservation should encroach somewhat upon the estimated seasonal power output of said first unit dam and power plant.

19. Payment of Operation and Maintenance.—If the state exercises the option herein granted and acquires the right to the power output of said first unit dam and power plant, the state will each year, in addition to the payment of the

principal and interest provided in said bonds, pay to the United States the cost of the operation and maintenance of the said first unit dam and power plant and transmission lines in connection therewith, as set out and determined by a statement of such cost to be furnished each year by the secretary to the commission until the enlargement of the said dam and power plant; and after the enlargement of said dam and power plant will pay a proportionate part of the cost of the operation and maintenance of the said enlarged dam and power plant, in proportion to the number of kilowatt hours of electrical energy secured by the United States and the state respectively from the said enlarged dam and power plant, and also a proportionate part of the cost of the operation and maintenance of such transmission lines as are used jointly by the United States and the state in proportion to the amount of electrical energy transmitted over such lines by each party. The said operation and maintenance charges shall be determined and paid in the following manner.

On or before December 1st of each year after the state has exercised the option granted herein and after power has become available from said first unit dam, the secretary will furnish the commission an advance estimate of the probable cost of the operation and maintenance of the said dam, [fol. 43] power plant and transmission lines for the coming calendar year from January 1 to December 31, inclusive, following next after the date of said estimate, and after the enlargement of said dam and power plant will also include in said advance estimate an estimate of the state's proper pro rata share of such operation and maintenance cost and expense according to the proportion herein provided for, which cost shall include all the elements of cost listed in article 15 hereof, and on or before January 1 following the date of said estimate, the state will pay to the United States the amount of the said estimated cost of operation and maintenance chargeable to the state as shown by and set out in said advance estimate, which shall be considered conclusive for this purpose.

Within ninety (90) days after the close of the year for which such payment has been made on such advance estimate basis, the secretary will furnish the commission a statement of the actual cost and expense of such operation and maintenance for the said past year, including all of the

items of expense listed in article 15 hereof, and after the enlargement of said dam and power plant will also include in said statement a statement of the state's proper pro rata share of said operation and maintenance cost, which statement by the secretary shall be considered conclusive for the purposes of this contract.

Within thirty (30) days after delivery of such statement of actual cost and expense of said operation and maintenance during the preceding year, the state will pay to the United States, or the United States will refund or credit to the state, such amount of money so that the total amount paid by the state to the United States as finally adjusted for each year's operation and maintenance of said works shall be the actual cost of the operation and maintenance of said works as shown by the said statement of actual cost up to the time of the enlargement of said dam and power plant, [fol. 44] and after the enlargement shall be the state's proper pro rata share of such actual cost as shown by said statement of actual cost.

20. Interest on Overdue Payments.—All charges herein agreed to be paid by the state to the United States which are not paid when due shall bear interest from the due date thereof until paid at the rate of six per cent (6%) per annum.

21. Default in Payment.—Should the state after exercising the option provided for herein, default in the payment of the principal or interest of said bonds or any part thereof, or any operation and maintenance charge herein agreed to be paid, the United States shall not be obliged to furnish any power to or for the state from said dam and power plant during the time that the state remains in default, and should such default continue more than two (2) years the United States may, at its option, by notice from the secretary to the commission, terminate all rights of the state and of the commission in said dam, power plant and transmission lines, and all rights of the state and of the commission under this contract as fully and completely as if this contract had never been made, but after such termination shall return said bonds to the state upon the payment by the state of all interest accrued thereon up to that time and all past due indebtedness of the state to the United States for operation and maintenance charges.

22. Rights if State Fails to Exercise Option.—Should the State decide not to exercise the option herein granted or allow the said option periods from the date thereof to elapse without the exercise of said option, the United States shall retain all rights in the said dam, power plant and transmission line and the power output thereof and the right to use, distrubute, sell or dispose of all electrical energy developed at said dam and power plant in such manner as the United States may deem best to pay the cost of the said project and accomplish the other purposes for which said project is intended.

[fol. 45] 23. United States not Liable for Damages.—The United States, its officers, agents or employees shall not be liable for damages when, for any reason, suspensions of the operation of the power system of the United States, or any part thereof, interfere with the delivery of electrical energy to the commission. The United States shall have the right to shut down its power plant and/or transmission lines and to cease the delivery of electrical energy temporarily whenever it shall be necessary to make repairs, replacements, or additions to its power plant, transmission lines, substations, dams or canals. Whenever possible, the United States will give reasonable advance notice of such temporary suspensions of service and will make all such repairs, replacements, and additions with diligence and will resume service without undue delay.

24. Rules and Regulations by Secretary.—The Secretary shall have the right to adopt and promulgate rules and regulations for the administration of the said project and the right to determine and decide all questions arising in connection with or growing out of the construction or operation and maintenance of said proposed dams, power plants and transmission lines and which are not expressly determined by law or the terms of this contract, and his decisions on such questions shall be conclusive.

25. Officials not to Benefit.—No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

[fol. 46] United States of America, by ——— ———, Secretary of the Interior. State of Washington, by The Columbia Basin Commission, by ——— ———, Chairman; by ——— ———, Secretary. (Seal.)

Attest: ——— ———.

Filed Superior Court, Thurston Co., Wash. Aug. 26, 10:00 A. M. 1935. Ellis C. Ayer, County Clerk. (In cause # 26059.)

Filed Superior Court, Thurston Co., Wash. Dec. 24 4:13 P. M. 1935 E. C. A. Ellis C. Ayer, Clerk, by ——— ———, Deputy.

[fol. 47] In Supreme Court of Washington

No. 26060

Thurston County No. 15668. 16294

David H. Ryan, Appellant,

vs.

The State of Washington, Respondent,

David H. Ryan, Appellant,

vs.

The Tax Commission of the State of Washington, Respondent

Judgment

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 10th day of December, A. D. 1936, on motion of G. W. Hamilton, Esquire, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said The

State of Washington and The Tax Commission of the State of Washington have and recover of and from the said David H. Ryan and from The Fidelity and Casualty Company of New York, surety, the costs of this action taxed and allowed at Seventy-Eight and 15/100 ($78.15) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Journal 33, page 270, records of the Supreme Court of the State of Washington.

[fol. 48] IN SUPREME COURT OF WASHINGTON

En Banc. No. 26060

DAVID H. RYAN, Appellant,

v.

THE STATE OF WASHINGTON, Respondent,

DAVID H. RYAN, Appellant,

v.

THE STATE TAX COMMISSION, Respondent

OPINION—Filed October 28th, 1936

Plaintiff brought these two actions seeking (1) the refund of an amount exacted from, and paid by, him as an occupation tax, and (2) an injunction to prevent the imposition against him of a subsequent tax of the same kind. Trial before the court, without a jury, resulted in a dismissal of both actions. Plaintiff has appealed.

The taxes imposed by the state in the first case were based upon the total amount of sales of merchandise made by appellant and also upon the total amount of gross income received by him in the performance of a federal government contract, all such sales and operations having been made and conducted within the area comprised in what is known as the Columbia Basin Project. The tax sought to be enjoined in the second case was based upon the total amount of gross income received by appellant in the performance of a second, and subsequent, federal government

contract operating within the same area. The principal question in the first case, and the only question in the second, is whether the state of Washington had any jurisdiction [fol. 49] within the territory of the project, sufficient to permit the state to impose and collect an occupation tax for services rendered therein by appellant to the federal government.

A brief history of the Columbia Basin Project will be of aid to a clearer understanding of the problem involved.

For a number of years, the people of this state have been actively interested in the development of the Columbia river and its tributaries. Between 1918 and 1932, many surveys and reports were made by engineers employed either by the state or else by the bureau of reclamation or the war department of the United States. These surveys and reports had relation to navigation, the development of hydroelectric power, and the reclamation of arid lands by irrigation. The state and its people were directly and particularly interested in, and concerned with, the features of power and reclamation. In 1932, the chief of engineers of the United States Army, after an exhaustive investigation, recommended a comprehensive plan for the improvement and development of the Columbia river for the purposes of navigation, flood control, power, and irrigation. The plan contemplated the ultimate construction of ten dams in the Columbia river, the first of which, together with a power plant, was to be erected at the head of Grand Coulee.

In 1933, the state legislature created the Columbia Basin Commission, consisting of five members, and authorized them to enter into contracts and to employ any and all means necessary to secure the immediate development of the Columbia Basin Project by means of the proposed Grand Coulee dam and the orderly development of the power, water, and soil resources incident thereto. Chapter 81, Laws of 1933, p. 376.

During this period of preparatory activities, the Grand Coulee dam and power plant had an indeterminate status, owing to the uncertainty as to whether the project would [fol. 50] be a state or a federal project. It seems that originally it was contemplated that the Columbia Basin Commission should at least carry on the necessary preliminary engineering. For that purpose, the Columbia Basin Commission obtained from the State Emergency Relief Commission an allocation of $377,000 of emergency relief funds.

This had the effect of tying in the project with the matter of emergency relief work, which was seriously engaging the attention of this, and of other states, at that time.

On June 30, 1933, the Columbia Basin Commission, in pursuance of its plan, entered into a contract with the United States, represented by the Bureau of Reclamation, Department of the Interior, wherein the United States agreed to make the topographic surveys and explorative work and to prepare the designs and specifications for construction work on the dam, for which the Columbia Basin Commission agreed to pay an initial sum of $50,000 at the time of the execution of the contract and the balance of the allocation of $377,000 as the work progressed. It appears that, during the period with which we are here concerned, the greater part of the $377,000 was paid as agreed.

It soon became apparent, however, that the work of construction itself would be of such magnitude and the expense so great that its completion would require the intervention of no less an agency than the federal government itself, with the unlimited financial resources at its command. Consequently, steps were taken to have the Grand Coulee dam and power plant included in the federal public works program. After considerable effort, this was accomplished, and an allocation of sixty-three million dollars for the dam and power plant was made by the federal bureau commonly known as NIRA.

On November 1, 1933, the United States, represented by the Secretary of the Interior, and pursuant to the reclama- [fol. 51] tion laws and the National Industrial Recovery Act, and the state of Washington, acting through the Columbia Basin Commission, entered into a contract relating to the construction of the dam, power plant, and power transmission lines at the Grand Coulee site, under the comprehensive plan above mentioned.

Some of the provisions of that contract are of particular interest in this controversy. The contract began with a series of ten recitals. No. 1 referred to the fact that the allotment of sixty-three million dollars, appropriated by NIRA, had been made available for the construction of the dam and power plant. No. 9 recited that the increased amount of firm power made possible at the lower dams by reason of the storage behind the Grand Coulee dam was an important factor in making the lower dams self-liquidating. No. 10 referred to the fact that the Columbia Basin

Commission had been created by the state legislature for the purpose of co-operating with the federal government in securing the construction of the project and of the Grand Coulee dam.

The contract then set forth the articles of agreement by number. The first, which is numbered article 11, provided for the expenditure by the United States of sixty-three million dollars, or so much thereof as was found necessary, in the construction of a dam and power plant at Grand Coulee site. Article 12 provided that the United States should retain title to the dam and power plant until the cost of the project had been fully repaid into the treasury of the United States. Article 13 reads as follows:

"13. Commission to Act in Advisory Capacity. The Commission will act as an advisory board representing the state in an advisory capacity in conferences with officers of the United States *concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines.*" (Italics ours.)

Then followed a number of provisions giving the state an option, for a period of eight and one-half years after the [fol. 52] date of the contract, to purchase the perpetual right to the entire output of the dam and power plant, upon the conditions set forth in detail therein. Article 24 reads as follows:

"24. Rules and Regulations by Secretary. The Secretary shall have the right to adopt and promulgate rules and regulations for the administration of the said project and the right to determine and decide all questions arising in connection with or growing out of the construction or operation and maintenance of said proposed dam, power plants and transmission lines *and which are not expressly determined by law* or the terms of this contract, and his decisions on such questions shall be conclusive." (Italics ours.)

At this point, appellant's first connection with the project appears. On November 29, 1933, appellant, a resident of San Diego, California, entered into a contract with the United States for the excavation of overburden at Columbia river dam site, Columbia Basin Project, "Washington," for the sum of $534,500. The specifications, attached

to and made a part of the contract, provided, among other things, that the appellant should obtain all required licenses and permits, should give preference, after ex-service men, to citizens who were residents of the county and state in which the work was to be performed, should furnish compensation insurance in compliance with the laws of the state wherein the work was to be done, and should comply with all applicable provisions of federal, state, and municipal safety laws and building and construction codes.

Appellant entered upon the execution of the work under the contract about January 1, 1934, and completed it in the summer of the same year. During the entire performance of the work, appellant maintained his office and living quarters within the territory of the project as hereinafter designated.

After the completion of that contract, appellant, on July 18, 1934, entered into a second contract with the United States, which was for the construction of a railroad at Grand Coulee dam, Columbia Basin Project, "Washington," for the sum of $235,570. The railroad was to be 34.5 [fol. 53] track miles in length, extending from the Northern Pacific Railway tracks at Odair, Washington, to the dam site. The specifications in this contract contained the same provisions as those to which we have specifically referred above. The actual residence of appellant, for about one-half of the time during which the second contract was being performed, was at Coulee City, which is outside of the territory of the project, and for the remainder of the time was at the dam site, on government land which had been obtained in the manner hereinafter described.

On July 16, 1934, which was two days before the execution of appellant's second contract, the United States entered into a contract with Silas Mason Company, Inc., and others, for construction work on Grand Coulee dam and power plant, Columbia Basin Project, "Washington," for the sum of $29,339,301.50. The last mentioned contract contemplated work on a gigantic scale, as is indicated by the figures just given. That contract, however, did not include the work to be done by appellant under either of his contracts.

We make reference, at this time, to the contract of Silas Mason Company, Inc., for the reason that out of it grew an action similar to the two involved here. Silas Mason Co.

v. State Tax Commission, ante, p. —. That action and these two were tried in the superior court at the same time and, by stipulation of the parties, all the evidence, insofar as it was material, was considered as applying to all three cases. The respective appeals were argued in this court on the same day, upon records containing identical statements of facts.

The specifications attached to the contract of Silas Mason Company, Inc., provided, among other things, and in addition to what has already been mentioned, that the contractor should make all necessary arrangements with the proper state and county authorities for school facilities, and that [fol. 54] police protection for the contractor's camp and the area involved in and surrounding the construction work would be furnished by the Washington State Patrol in cooperation with the federal government, but that the contractor should provide, at its camp site, such jail facilities as were satisfactory to the Washington State Patrol.

The area included in the entire project above mentioned does not specifically and satisfactorily appear from the record, and we are unable to say exactly how much land is included therein. It does appear, however, that the area is very extensive, covering many acres of land on both sides of the Columbia river and including a railroad right of way 34.5 miles in length. There are two important things, however, to be noted in this connection. The first is that, during the time that the construction work was in progress, the United States, through condemnation proceedings brought against a number of individuals and corporations, acquired possession of, and title to, the various tracts of land now within the area of the project. A transcript of one of such condemnation proceedings, stipulated to be similar in form to all the others, is made a part of the record herein. It shows that the title to that particular tract was acquired by the United States on or after May 14, 1934, which was after appellant had commenced work. The other important factor to be noted is that, included in the area of the project, are school lands of the state and also tribal lands, all of which have been taken over by the federal government and now form a part of the project.

At the seventy-fourth session of the United States Congress, an act was passed authorizing the construction, repair, and preservation of certain public works on rivers and

harbors and for other purposes. The act ratified and validated all contracts and agreements that had been theretofore executed in connection with the Grand Coulee dam project. H. R. 6732, Public Act 409. The work contemplated [fol. 55] to be done upon the project by the United States was not in furtherance of any war measure or for the national defense, but simply for the improvement of navigation and for industrial recovery.

During the period of the construction work under his first contract, appellant maintained warehouses on ground within the project and at the dam site, where he stored and sold gasoline, oil, tires, and automobile accessories. Appellant paid the state a tax on these sales, the recovery of which forms a part of the basis of his first action.

At its regular session of 1933, the legislature of this state passed an act commonly known as the occupation tax act, chapter 191, Laws of 1933, p. 869, et seq. The act related to certain business activities "within this state." At its special session of 1933, the legislature amended the former act in certain respects. Chapter 57, Laws of 1933, Ex. Ses., p. 157 et seq. That act likewise applied to business activities "within this state." The latter act became effective January 18, 1934, which was shortly after appellant's first contract had been entered into, but before it was performed.

These two actions are in resistance to the application of either of these legislative acts to appellant's activities.

Appellant's first contention is that his construction or excavation contracts constituted sales of services, within the provisions of chapter 191, and that by § 5 of that act, read in connection with § 2 (2)(f), the proceeds of his contracts were exempt from the tax.

The answer to this contention is that the tax was not imposed under chapter 191 as it originally stood, but under chapter 57, § 1 (designated as § 2-a) (1), which clearly covers business activities of the kind engaged in by appel- [fol. 56] lant, if "within this state." This contention of appellant is but briefly discussed by either counsel, and, we think, merits nothing further than what we have already said.

The principal, and only remaining, question in the case is whether appellant's activities took place "within this state." Specifically stated, the contention of appellant is that, by virtue of the United States constitution and the

statutes of this state, the area contained within the project upon which the excavation and construction work was performed is under the exclusive jurisdiction of the United States, and that, therefore, any tax legislation of the state is wholly inoperative within the area of the project or upon any activities of appellant therein. Quotation of the specific constitutional and statutory provisions involved will first be made.

Art. I, § 8, clause 17, of the constitution of the United States provides that Congress shall have power:

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, *and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;* * * *" (Italics ours.)

Our reference to, and discussion of, this constitutional provision relate only to the latter, or italicized, portion of the quotation.

Rem. Rev. Stat., § 8108, adopted in 1891, provides that:

"The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, * * * the consent herein and hereby [fol. 57] given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of Congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of

America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

It will be observed that the statute, while somewhat broader than Art. I, §8, clause 17 in its designation of structures and purposes, nevertheless specifically recites that the consent therein given is in accordance with the constitutional provision.

The provision of Art. I, §8, clause 17, as above quoted and italicized, has been frequently construed by the United States supreme court, and it is now definitely settled and accepted that there are two ways in which lands within the jurisdiction of the state may become subject to the exclusive jurisdiction of the United States: (1) By purchase by the United States for certain specified purposes, with the consent of the state, and (2) cession of exclusive jurisdiction to the United States by the state. Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; United States v. Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761; Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091; Standard Oil Co. v. California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775.

From these cases, the following rules are deducible respecting jurisdiction over lands acquired by the United States for public uses: (1) When the land is acquired for one of the purposes within Art. I, §8, clause 17, by purchase with consent of the state, federal jurisdiction is exclusive in such area for all purposes; (2) when the land is acquired for one of the purposes within that clause, but [fol. 58] other than by purchase with the consent of the state, then federal jurisdiction is exclusive only to the extent of the purposes for which the land is held; (3) when the land is acquired for a purpose not within that clause,

but by purchase with the consent of the state, then the United States has such jurisdiction over the land as may be ceded to it by the state; and (4) when the land is acquired for a purpose not within that clause, in any manner other than by purchase with the consent of the state, then the United States holds the land just as any other proprietor does, except that the land may not be taxed by the state. Our ultimate problem herein will be to determine under which one or more, if any, of these classifications, the present case falls.

Manifestly, the construction work involved in this case does not come within any of the uses implied in the descriptive terms of the constitutional provision, unless it can be said to come within the term "other needful buildings." If the case were one of first impression, the rule of *ejusdem generis* would, in our opinion, exclude such work from the classification of "needful buildings" because the particular work was in no way connected with, or related to, forts, magazines, arsenals, or dockyards.

However, by judicial interpretation, over a long period of years, the term "needful buildings" has been applied to the following: a navy yard (Western Union Tel. Co. v. Chiles, 214 U. S. 274, 29 S. Ct. 613, 53 L. Ed. 994); a military hospital (Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447); a military reservation (United States v. Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761); an army training and mobilization station (Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091); a customs house (Sham v. Hill, 24 Fed. 726); locks and dams (United States v. Tucker, 122 Fed. 518); a post office (United States v. Andem, 158 Fed. 996); a penitentiary (Steel v. Halligan, 229 Fed. 1011); an Indian train-[fol. 59] ing school (United States v. Wurtbarger, 276 Fed. 753); a military cemetery (Wills v. State, 50 Tenn. 141); a soldiers' home (Sinks v. Reese, 19 Ohio 306); a courthouse (State v. Mack, 23 Nev. 359, 47 Pac. 62).

While the structures mentioned in the foregoing cases are not specifically named in, and do not strictly fall within, the constitutional classification, it is, nevertheless, apparent that the particular structures or "buildings" in those cases, with the possible exception of one, are such as would necessarily require absolute and exclusive jurisdiction in the United States government, because their operation is

in the discharge of a constitutional or governmental function, and there is no field for state participation or state legislation. The only possible exception in the list is the instance of locks and dams, involved in the Tucker case. But even in such case, if the locks and dams were owned and operated by the United States solely for the purpose of facilitating navigation, as they concededly were in that case, their function would likewise be a constitutional or governmental function. But irrigation, flood control, and power development (except insofar as the latter two are intended to promote navigation or else some war measure or the national defense), while they may be of national interest and serve a public purpose, are not functions enjoined upon the federal government by the constitution, nor are they delegated to the United States by the constitution, nor is it necessary that they be committed, for their operation, to the exclusive jurisdiction of the United States government. Legislative power, with reference to such things, is reserved in the state.

Turning, now, to the statute above quoted, we note that the state has given its consent to the acquisition, by purchase or condemnation on the part of the United States, of lands for sites of locks, dams, etc., as well as for the pur- [fol. 60] poses set forth in the constitutional provision. For present purposes, it may be conceded that the term "needful buildings" is broad enough, under the construction given to that term by the federal courts, to include locks and dams. It is very probable that specific mention of locks and dams was made in the statute in order to remove any doubt that may have existed generally at, and prior to, the time of the decision in the Tucker case, with respect to the inclusive extent of the constitutional provision.

The point that we make and stress here, and upon which we rest our ultimate conclusion herein, is that, while the statute conferred consent upon the United States to acquire land within the territory of the state, the state's power to cede jurisdiction is limited, by the statute, to those instances where it clearly appears that the land is to be used by the United States for a constitutional or governmental purpose. As stated in the leading case upon the subject, Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264, supra:

"The essence of that provision [Art. I, §8, clause 17, United States constitution] is that the state shall *freely* cede the particular place to the United States for one of the specifically enumerated objects." (Italics ours.)

The question in this case, then, is whether, by reason of the conjunction of the constitutional provision, the statute, and the acquisition by the federal government of the lands within the project in the manner and for the purposes that the government acquired them, the state has been *ipso facto* deprived of all jurisdiction with respect to such lands. However close the question may seemingly be, we are of the opinion that the state has not been deprived of all jurisdiction, but that it has a concurrent jurisdiction to the extent, among other things, that it has the right to impose a tax upon business activities conducted within the area of the project. The reason for this conclusion is based upon what we conceive to be fundamental principles of law and the conducive facts of this case.

[fol. 61] By the enabling act of Congress, passed February 22, 1889, the territory of Washington became the state of Washington. Subject to the limitations and restraints of the federal constitution, the state, as such, has all the sovereign powers of independent nations over all persons and things within its territorial limits. Sturges v. Crowinshield, 4 Wheat. 122, 4 L. Ed. 529; New York v. Miln, 11 Pet. 102, 9 L. Ed. 648; Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356. The area within, and under, the jurisdiction of a state may come under the exclusive jurisdiction of the United States by purchase by the federal government for a purpose prescribed by the federal constitution and with the consent of the state, or by cession of exclusive jurisdiction by the state to the United States. In either event, the land acquires a territorial status and ceases to be a part of the state, either territorially or jurisdictionally. Concessions Co. v. Morris, 109 Wash. 46, 186 Pac. 655. But, since self-preservation is the first law of nations and states, as well as of individuals, it will not be presumed, in the absence of clearly expressed intent, that the state has relinquished its sovereignty. Wills v. State, 50 Tenn. 141; In re Kelly, 71 Fed. 545; Ex Parte Gibbons, 56 Ark. 277, 19 S. W. 602; Barrett v. Palmer, 135 N. Y. 336, 31 N. E. 1017, 31 Am. St. 835, 17 L. R. A. 720 (Four of these cases are cited approvingly in the Concessions Co. case).

The power of taxation is an incident of sovereignty and inherent in the state, because government cannot exist or function without it. It is a legislative power following the more general power to make laws. State ex rel. Commissioners v. Clausen, 95 Wash. 214, 163 Pac. 744. The power of taxation is never to be suspended, surrendered, or contracted away. Amendment XIV, Washington constitution. In the absence of constitutional restraint, the power of the legislature over taxation is as unlimited as the subject with which it deals. State ex rel. State Tax Commission v. Redd, [fol. 62] 166 Wash. 132, 6 P. (2d) 619; 26 R. C. L. 27, §13. The taxing power of the state is never presumed to have been relinquished unless the language in which the surrender is made is clear and unmistakable. Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595; 1 Cooley on Taxation (4th ed.) 159, §60.

This is not a contest between the federal government and the state as to jurisdiction. It is a contest between the state, asserting its concurrent, or partial, jurisdiction, and an individual who asserts that exclusive jurisdiction rests in the federal government. So far from there being any contest as to jurisdiction between the two sovereign powers, the record discloses that they are working in harmony and accord, each exercising the field for which it is the better equipped and each, at the same time, recognizing the field of the other. The federal government, therefore, cannot possibly be prejudiced by the result of this action.

It appears from what we have already stated that prior to, at the time of, and at all times since, the inception of the project, the United States and the state have cooperated in every way in the development and construction of the dam and power plant. The federal government at present furnishes the money, supervises the work, and will, for a time, maintain the operation of the project. The state, on the other hand, has furnished a large amount of money for the preliminary work and now, through the Columbia Basin Commission, acts in an advisory capacity to the federal government in the further progress of the work. The state also has an option to take over the entire project when completed. The federal government is involved in a huge undertaking, the object of which is to promote navigation, develop power, and provide for irrigation. The state is likewise concerned. Navigation is a function that comes

within the exclusive power of the federal government by virtue of the constitution of the United States. The devel- [fol. 63] opment of irrigation and of power for industrial purposes, however, is within the reserved powers of the state. There is, thus, every reason why the federal government and the state should co-operate, and, in order to do so, each must have proportionate jurisdiction.

"We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty." South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261.

On the other hand, if the state were excluded from all jurisdiction, the residents of the project would be without school facilities, police protection, and the right to vote, the workmen would be deprived of the benefit of industrial insurance, and the rules for sanitation would be suspended; for, if the state be wholly without jurisdiction, then it must follow that the state may not extend its privileges to the residents of the project nor expend its money in their behalf. Opinion of Justices, 42 Mass. 580; In re Town of Highlands, 22 N. Y. Supp. 137; Sinks v. Reese, 19 Ohio 306; State ex rel. Lyle v. Willett, 117 Tenn. 334, 97 S. W. 299; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091.

Furthermore, so far as the record supplies us with any information, the federal government did not acquire these lands until after the work of construction, under appellant's first contract, had been begun. Some of the lands, it appears, were not acquired until about the time that the work

under the contract was completed. The record discloses that when appellant entered into the second contract, although all of the lands had then been acquired, the state was exercising its jurisdiction within the project at the [fol. 64] instance of the federal government itself. Moreover, it does not appear from the record that the federal government ever set apart any definite reserve as constituting the project, but, rather, that it appropriated lands from time to time as the necessities of the project required; this fact may not be a controlling one, but is nevertheless entitled to consideration.

The facts, taken as a whole, argue conclusively, in our opinion, that the state never intended to cede, and the United States never intended to take, exclusive jurisdiction over the project. Facts consistent with the retention, and inconsistent with cession, of exclusive jurisdiction by the state should, in the absence of any assertion by the federal government to the contrary, be construed most strongly in favor of the state, to the end that its territory be not diminished and that its jurisdiction in matters in which the federal government is not directly or immediately concerned be not entirely lost.

We conclude, therefore, that the purposes of the project, taken as a whole, do not fall exclusively within any of the enumerated classes mentioned above, so as to give the United States exclusive jurisdiction over the lands, but, rather in a class where several purposes are so intermingled as to call for the exercise of jurisdiction by both the federal government and the state, according as their respective interests and duties require. Insofar as the legislative acts in question are concerned, they are operative upon the business activities of the appellant within the project.

[fol. 65] The judgments are affirmed.

Steinert, J.

We concur:

Millard, C. J. Main, J. Mitchell, J. Tolman, J.
Holcomb, J. Beals, J. Blake, J. Geraghty, J.

[fol. 66] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed January 15, 1937

Your petitioner, David H. Ryan, respectfully sets forth that on October 28th, 1936, the Supreme Court of the State of Washington, sitting at Olympia, Washington, made and entered a final judgment and order in favor of appellees and against your petitioner in the above entitled consolidated cases, which order and judgment dismissed both of said actions heretofore brought by your petitioner against said appellees. That the said Supreme Court of the State of Washington is the highest court of the State of Washington in which a decision in said cases can be had. Considering himself aggrieved by said final order and judgment of the said Supreme Court of the State of Washington the said David H. Ryan hereby prays that an appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of the bond thereon.

[fol. 67] ASSIGNMENT OF ERRORS

The said David H. Ryan assigns the following errors in the record and proceedings in said cases: That the statute of the State of Washington imposing an occupation tax is unconstitutional and void as applied to the particular transactions stated in the complaints of appellant in this:

I.

The Supreme Court of the State of Washington erred in not holding that under Article I., Section 8, Clause 17 of the Constitution of the United States the United States had exclusive jurisdiction over lands within the territorial jurisdiction of the State of Washington acquired by the United States by purchase or condemnation with the consent of the State of Washington, under Section 8108, Remington's Revised Statutes of the State of Washington, for the purpose of construction of the Grand Coulee Dam, with necessary appurtenant buildings and structures, for

the improvement of navigation of the Columbia River, upon which lands so acquired and held the said David H. Ryan, appellant herein, performed all the work and received all the income on which the State of Washington had levied and seeks to levy an excise tax.

II.

The Supreme Court of the State of Washington erred in not holding that the United States had exclusive jurisdiction over lands within the territorial jurisdiction of the State of Washington acquired by the United States by purchase or condemnation for the purpose of the construction of the Grand Coulee Dam, with the necessary appurtenant buildings and structures, for the improvement of navigation of the Columbia River, jurisdiction over which was ceded to the United States by the State of Washington under Section 8108, Remington's Revised Statutes of the State of Washington, and upon which lands so acquired and held the said David H. Ryan, appellant herein, performed all the work and received all the income on which the State of Washington has levied and seeks to levy an excise tax.

[fol. 68]

III.

The Supreme Court of the State of Washington erred in holding that the said David H. Ryan, appellant herein, was liable to pay to the State of Washington an excise tax under Section 8370-1 et. seq., Remington's Revised Statutes of the State of Washington, Chapter 191, Session Laws of the State of Washington for 1933, as amended by Chapter 57 Extraordinary Session of 1933, on account of gross income received by him for work done and merchandise sold wholly upon and within the confines of land acquired by the United States by purchase or condemnation within the territory of the State of Washington with the consent of the State of Washington and with jurisdiction thereon ceded by the State of Washington to the United States by virtue of Section 8108 Remington's Revised Statutes of the State of Washington and in accordance with Article I., Section 8, Clause 17 of the Constitution of the United States, for the purpose of the construction of the Grand Coulee Dam for improvement of navigation of the Columbia River, together with the necessary buildings and structures appurtenant thereto.

IV.

The Supreme Court of the State of Washington erred in dismissing the action of appellant David H. Ryan herein:

First: To recover back money paid to appellee, The State of Washington, on account of an assessment made therefor by the Tax Commission of the State of Washington for excise taxes alleged to be due from said appellant, and,

Second: To restrain the appellees, the Tax Commission of the State of Washington and Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, constituting said Tax Commission, from collecting or attempting to collect any further excise taxes from appellant; on the ground that all income [fols. 69-72] earned and received by appellant within the State of Washington was so earned and received by him wholly upon and within the confines of lands acquired by the United States by purchase or condemnation with the consent of the State of Washington and with jurisdiction thereover ceded by the State of Washington to the United States under Section 8108, Remington's Revised Statutes of the State of Washington, and in accordance with Article I., Section 8, Clause 17 of the Constitution of the United States, and that the said action of appellees, State of Washington and its Tax Commission, in collecting and seeking to collect said tax is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant, David H. Ryan, of his property without due process of law and denies to him equal protection of the laws.

V.

The Supreme Court of the State of Washington erred in not holding that the occupation tax levied and collected or sought to be levied and collected by the appellees, being a tax upon the gross income of the appellant received under contracts with the United States, constituted a direct burden upon the United States and was therefore illegal and void.

PRAYER FOR REVERSAL

For which errors heretofore assigned appellant prays that the said judgment of the Supreme Court of the State of Washington dated October 28th, 1936, in the above en-

titled cause be reversed and a judgment entered in favor of said appellant, and for costs.

B. H. Kizer, Counsel for Appellant. M. J. Luby, E. D. Weller, Of Counsel. Address: 611 Paulsen Bldg., Spokane, Was-.

[fol. 73] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 15, 1937

The appellant in the above entitled actions having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered herein by the Supreme Court of the State of Washington on the 28th day of October, 1936, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction pursuant to the statutes and the rules of the Supreme Court of the United States,

It is Therefore Ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Washington in the above entitled cause, as provided by law,

It is Further Ordered that the Clerk of the Supreme Court of the State of Washington shall prepare and certify a transcript of the record herein in accordance with Rule X. of the [fol. 74] Rules of the Supreme Court of the United States and that he shall have same in the said Court within sixty days of this date.

It is Further Ordered that security for costs on appeal be fixed in the sum of $1000.00 and for supersedeas $1000.00.

Dated this 15th day of January, 1937.

Wm. J. Steinert, Chief Justice of the Supreme Court of the State of Washington.

[fols. 75-76] Bond on appeal for $2,000.00, approved and filed January 15, 1937, omitted in printing.

[fols. 77-78] Citation, in usual form, showing service on E. P. Donnelly, filed January 15, 1937, omitted in printing.

[fol. 79] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed January 19, 1937

To the Honorable Benjamin T. Hart, Clerk of the Supreme Court of the State of Washington:

It is Stipulated between counsel for appellant and appellees herein that you shall prepare and transmit to the Supreme Court of the United States under your hand and the seal of the Supreme Court of the State of Washington, in the manner and in the time required by the statutes of the United States, the rules of the Supreme Court of the United States, and the order allowing the appeal herein, a true copy of the material parts of the record herein, including the following:

1. Appeal from order of Tax Commission in Ryan vs. State.
2. Complaint in Ryan vs. State Tax Commission.
3. Answer in Ryan vs. State Tax Commission.
4. (a) That part of the statement of facts beginning at line 30, page 7, to line 22, page 22, and that part of the statement of facts beginning at line 5, page 49, to line 11, page 60.

(b) That part of certified copy of condemnation proceedings, being Exhibit "B", as follows: paragraph 3 of the com-[fol. 80] plaint, that part of declaration of taking, beginning with the words, "that said land is taken" and extending to bottom of page.

(c) Article 21 of Exhibit "A", being contract between David H. Ryan and United States.

(d) Exhibit 7 to amended complaint in your case No. 26059, being copy of proposed contract between the United States and State of Washington.

5. Judgment in Ryan vs. State.
6. Judgment in case of Ryan vs. State Tax Commission.

7. Opinion of Supreme Court of the State of Washington filed October 28th, 1936.
8. Petition for allowance of appeal, assignment of errors and prayer for reversal.
9. Statement as to jurisdiction.
10. Order allowing appeal.
11. Bond.
12. Citation.
13. Proof of service and notice of Rule 12, paragraph 3.
14. Stipulated præcipe for record.

It is Further Stipulated that any additional matters of record may be supplied by either party hereto that are deemed necessary, and that counsel may further stipulate in open court as to any other matters as to which information may be asked by the court.

B. H. Kizer, Counsel for Appellant. M. J. Luby, E. D. Weller, of Counsel. E. P. Donnelly, Counsel for Appellees.

[fol. 81] In Supreme Court of the United States

[Title omitted]

Stipulation re Original Exhibits—Filed February 9, 1937

It is hereby stipulated that the clerk of the Supreme Court of the State of Washington shall transmit to the clerk of the Supreme Court of the United States all of the original exhibits on file in the case of David H. Ryan vs. State of Washington, #26060, in addition to the record prepared according to the præcipe.

B. H. Kizer, Attorney for Appellant. E. P. Donnelly, Attorneys for Appellees.

Received Feb. 8, 1937, Attorney General's Office.

[File endorsement omitted.]

[fol. 82] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed March 3, 1937

Comes now the appellant and adopts his assignments of error as his statement of the points to be relied upon herein, and represents that the whole of the record as filed is necessary for the consideration of these cases.

Ben H. Kizer, Counsel for Appellant. M. J. Luby, E. D. Weller, of Counsel.

Copy received this 24th day of Jan., 1937. E. P. Donnelly, Attorneys for Appellees.

[fol. 84] [File endorsement omitted.]

Endorsed on cover: File No. 41,314. Washington Supreme Court. Term No. 774. David H. Ryan, appellant, vs. The State of Washington et al. Filed March 3, 1937. Term No. 774, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 774

DAVID H. RYAN,

Appellant,

vs.

THE STATE OF WASHINGTON,

Appellee.

DAVID H. RYAN,

Appellant,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, THOMAS S. HEDGES, AND T. M. JENNER, CONSTITUTING THE TAX COMMISSION OF THE STATE OF WASHINGTON,

Appellees.

STATEMENT AS TO JURISDICTION.

Appellant, David H. Ryan, now is and at all times herein mentioned was a resident and citizen of San Diego, California. He had two contracts with the United States, one for preliminary excavation work for the construction of the Grand Coulee Dam, and one for the construction of a railroad from the Northern Pacific Railway tracks at Odair,

Washington, to the damsite for transporting materials and supplies to said project, all of said work being performed within the territorial confines of the State of Washington.

All of the work done by appellant in the performance of these contracts was upon land acquired by the United States by purchase or condemnation for the purpose of the construction of said dam, and appurtenant buildings and structures for improvement of navigation of the Columbia River, the acquisition of said lands being with the consent of the State of Washington and with jurisdiction over same ceded by the State of Washington to the United States by Section 8108 (Vol. 9, p. 276) of Remington's Revised Statutes of the State of Washington. This section provides generally that the State of Washington gives its consent to the acquisition by purchase or condemnation by the United States of lands within the limits of the State of Washington for the sites of locks and dams and other necessary structures and purposes required in the improvement of the rivers and harbors of the State and cedes jurisdiction over all lands acquired for said purposes to the United States, the only restriction thereon being the ordinary reservation of jurisdiction for service of process.

Appellant during the performance of the first contract had a warehouse upon the lands so acquired and held by the United States where he sold merchandise, such sales being made and payment received wholly upon said lands.

During the period within which appellant was engaged in carrying out said contracts there was in force in the State of Washington a law providing for the levy and collection of an excise tax, generally called the Occupation Tax Act, being Section 8370-1 *et seq.*, Remington's Revised Statutes of the State of Washington, providing in general for payment of a tax upon the gross income of all business conducted in the State of Washington.

Under this law the Tax Commission of the State of Washington levied an assessment against appellant upon income received by him from the United States from the performance of said contracts and from the sale of merchandise upon the lands so acquired and held by the United States.

Appellant paid said assessment and brought suit to recover same, as authorized by Section 8370-199 of Remington's Revised Statutes of the State of Washington, and also brought suit to restrain the Tax Commission of the State of Washington from levying or collecting any occupation tax from him on account of any income received by him from contracts performed or business transacted wholly upon the lands so acquired and held by the United States, which actions were consolidated for hearing in both the Trial and Appellate Courts.

Appellant contends that under Article I, Section 8, Clause 17 of the Constitution of the United States and Section 8108 of Remington's Revised Statutes of the State of Washington exclusive jurisdiction over said lands was vested in the United States;

Ft. Leavenworth Railroad Co. v. *Lowe,* 114 U. S. 525, 5 S. Ct. 995, 29 Law Ed. 264;

Surplus Trading Co. v. *Cook,* 281 U. S. 647, 50 S. Ct. 455, 74 Law Ed. 1091;

Standard Oil Co. v. *California,* 291 U. S. 242, 54 S. Ct. 381, 78 Law Ed. 775;

United States v. *Tucker,* 122 Fed. 518;

and that any attempt to levy and collect said tax is contrary to the Fourteenth Amendment to the United States Constitution;

Farmers Loan & Trust Co. v. *Minnesota,* 280 U. S. 204, 50 S. Ct. 98, 74 Law Ed. 371;

Safe Deposit & Trust Co. v. *Virginia,* 280 U. S. 83, 50 S. Ct. 59, 74 Law Ed. 180.

Appellant further contends that the tax on gross income received by appellant under contracts with the United States constitutes a direct burden upon the United States and was therefore illegal and void.

United States Glue Company v. *Town of Oak Creek*, 247 U. S. 321;

Dravo Contracting Company v. *Fox*, U. S. District Court, Southern District of West Virginia, decided October 1st, 1936; No. 625, October Term, 1936.

Appellant's actions were dismissed by the Supreme Court of the State of Washington on October 28, 1936, and this appeal is prosecuted under Section 344-a, Title 28 of the United States Code Annotated. Appellant's petition for allowance of this appeal was filed on January 15, 1937.

B. H. KIZER,
Counsel for Appellant,
M. J. LUBY,
E. D. WELLER,
Of Counsel,
Address: 611 Poulsen Bldg., Spokane, Wash.

EXHIBIT "A".

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EN BANC.

No. 26060

DAVID H. RYAN, *Appellant,*

v.

THE STATE OF WASHINGTON, *Respondent.*

DAVID H. RYAN, *Appellant,*

v.

THE STATE TAX COMMISSION, *Respondent.*

Filed October 28th, 1936

Plaintiff brought these two actions seeking (1) the refund of an amount exacted from, and paid by, him as an occupation tax, and (2) an injunction to prevent the imposition against him of a subsequent tax of the same kind. Trial before the court, without a jury, resulted in a dismissal of both actions. Plaintiff has appealed.

The taxes imposed by the state in the first case were based upon the total amount of sales of merchandise made by appellant and also upon the total amount of gross income received by him in the performance of a federal government contract, all such sales and operations having been made and conducted within the area comprised in what is known as the Columbia Basin Project. The tax sought to be enjoined in the second case was based upon the total amount of gross income received by appellant in the performance of a second, and subsequent, federal government contract operating within the same area. The principal question in the first case, and the only question in the second, is whether the state of Washington had any jurisdiction *within* the territory of the project, sufficient to permit the state to impose and collect an occupation tax for services

rendered therein by appellant to the federal government.

A brief history of the Columbia Basin Project will be of aid to a clearer understanding of the problem involved.

For a number of years, the people of this state have been actively interested in the development of the Columbia river and its tributaries. Between 1918 and 1932, many surveys and reports were made by engineers employed either by the state or else by the bureau of reclamation or the war department of the United States. These surveys and reports had relation to navigation, the development of hydroelectric power, and the reclamation of arid lands by irrigation. The state and its people were directly and particularly interested in, and concerned with, the features of power and reclamation. In 1932, the chief of engineers of the United States Army, after an exhaustive investigation, recommended a comprehensive plan for the improvement and development of the Columbia river for the purposes of navigation, flood control, power, and irrigation. The plan contemplated the ultimate construction of ten dams in the Columbia river, the first of which, together with a power plant, was to be erected at the head of Grand Coulee.

In 1933, the state legislature created the Columbia Basin Commission, consisting of five members, and authorized them to enter into contracts and to employ any and all means necessary to secure the immediate development of the Columbia Basin Project by means of the proposed Grand Coulee dam and the orderly development of the power, water, and soil resources incident thereto. Chapter 81, Laws of 1933, p. 376.

During this period of preparatory activities, the Grand Coulee dam and power plant had an indeterminate status, owing to the uncertainty as to whether the project would be a state or a federal project. It seems that originally it was contemplated that the Columbia Basin Commission should at least carry on the necessary preliminary engineering. For that purpose, the Columbia Basin Commission obtained from the State Emergency Relief Commission an allocation of $377,000 of emergency relief funds. This had the effect of tying in the project with the matter of emer-

gency relief work, which was seriously engaging the attention of this, and of other states, at that time.

On June 30, 1933, the Columbia Basin Commission, in pursuance of its plan, entered into a contract with the United States, represented by the Bureau of Reclamation, Department of the Interior, wherein the United States agreed to make the topographic surveys and explorative work and to prepare the designs and specifications for construction work on the dam, for which the Columbia Basin Commission agreed to pay an initial sum of $50,000. at the time of the execution of the contract and the balance of the allocation of $377,000 as the work progressed. It appears that, during the period with which we are here concerned, the greater part of the $377,000 was paid as agreed.

It soon became apparent, however, that the work of construction itself would be of such magnitude and the expense so great that its completion would require the intervention of no less an agency than the federal government itself, with the unlimited financial resources at its command. Consequently, steps were taken to have the Grand Coulee dam and power plant included in the federal public works program. After considerable effort, this was accomplished, and an allocation of sixty-three million dollars for the dam and power plant was made by the federal bureau commonly known as NIRA.

On November 1, 1933, the United States, represented by the Secretary of the Interior, and pursuant to the reclamation laws and the National Industrial Recovery Act, and the state of Washington, acting through the Columbia Basin Commission, entered into a contract relating to the construction of the dam, power plant, and power transmission lines at the Grand Coulee site, under the comprehensive plan above mentioned.

Some of the provisions of that contract are of particular interest in this controversy. The contract began with a series of ten recitals. No. 1 referred to the fact that the allotment of sixty-three million dollars, appropriated by NIRA, had been made available for the *construction* of the dam and power plant. No. 9 recited that the increased amount of firm power made possible at the lower dams by

reason of the storage behind the Grand Coulee dam was an important factor in making the lower dams self-liquidating. No. 10 referred to the fact that the Columbia Basin Commission had been created by the state legislature for the purpose of co-operating with the federal government in *securing the construction* of the project and of the Grand Coulee dam.

The contract then set forth the articles of agreement by number. The first, which is numbered article 11, provided for the expenditure by the United States of sixty-three million dollars, or so much thereof as was found necessary, in the *construction* of a dam and power plant at Grand Coulee site. Article 12 provided that the United States should retain title to the dam and power plant until the cost of the project had been fully repaid into the treasury of the United States. Article 13 reads as follows:

> "13. Commission to Act in Advisory Capacity. The Commission will act as an advisory board representing the state in an advisory capacity in conferences with officers of the United States *concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines.*" (Italics ours.)

Then followed a number of provisions giving the state an option, for a period of eight and one-half years after the date of the contract, to purchase the perpetual right to the entire output of the dam and power plant, upon the conditions set forth in detail therein. Article 24 reads as follows:

> "24. Rules and Regulations by Secretary. The Secretary shall have the right to adopt and promulgate rules and regulations for the administration of the said project and the right to determine and decide all questions arising in connection with or growing out of the construction or operation and maintenance of said proposed dam, power plants and transmission lines *and which are not expressly determined by law* or the terms of this contract, and his decisions on such questions shall be conclusive." (Italics ours.)

At this point, appellant's first connection with the project appears. On November 29, 1933, appellant, a resident of San Diego, California, entered into a contract with the United States for the excavation of overburden at Columbia river dam site, Columbia Basin Project, "Washington," for the sum of $534,500. The specifications, attached to and made a part of the contract, provided, among other things, that the appellant should obtain all required licenses and permits, should give preference, after ex-service men, to citizens who were residents of the county and *state in which the work was to be performed,* should furnish compensation insurance in compliance with the laws of the *state wherein the work was to be done,* and should comply with all applicable provisions of federal, *state and municipal* safety laws and building and construction codes.

Appellant entered upon the execution of the work under the contract about January 1, 1934, and completed it in the summer of the same year. During the entire performance of the work, appellant maintained his office and living quarters within the territory of the project as hereinafter designated.

After the completion of that contract, appellant, on July 18, 1934, entered into a second contract with the United States, which was for the construction of a railroad at Grand Coulee dam, Columbia Basin Project, "Washington," for the sum of $235,570. The railroad was to be 34.5 track miles in length, extending from the Northern Pacific Railway tracks at Odair, Washington, to the dam site. The specifications in this contract contained the same provisions as those to which we have specifically referred above. The actual residence of appellant, for about one-half of the time during which the second contract was being performed, was at Coulee City, which is outside of the territory of the project, and for the remainder of the time was at the dam site, on government land which had been obtained in the manner hereinafter described.

On July 16, 1934, which was two days before the execution of appellant's second contract, the United States entered into a contract with Silas Mason Company, Inc., and others, for construction work on Grand Coulee dam and

power plant, Columbia Basin Project, "Washington," for the sum of $29,339,301.50. The last mentioned contract contemplated work on a gigantic scale, as is indicated by the figures just given. That contract, however, did not include the work to be done by appellant under either of his contracts.

We make reference, at this time, to the contract of Silas Mason Company, Inc., for the reason that out of it grew an action similar to the two involved here. Silas Mason Co. *v.* State Tax Commission, *ante*, p. —. That action and these two were tried in the superior court at the same time and, by stipulation of the parties, all the evidence, insofar as it was material, was considered as applying to all three cases. The respective appeals were argued in this court on the same day, upon records containing identical statements of facts.

The specifications attached to the contract of Silas Mason Company, Inc., provided, among other things, and in addition to what has already been mentioned, that the contractor should make all necessary arrangements with the proper *state and county authorities* for school facilities, and that police protection for the contractor's camp and the area involved in and surrounding the construction work would be furnished by the Washington State Patrol in co-operation with the federal government, but that the contractor should provide, at its camp site, such jail facilities as were satisfactory to the Washington State Patrol.

The area included in the entire project above mentioned does not specifically and satisfactorily appear from the record, and we are unable to say exactly how much land is included therein. It does appear, however, that the area is very extensive, covering many acres of land on both sides of the Columbia river and including a railroad right of way 34.5 miles in length. There are two important things, however, to be noted in this connection. The first is that, during the time that the construction work was in progress, the United States, through condemnation proceedings brought against a number of individuals and corporations, acquired possession of, and title to, the various tracts of land now within the area of the project. A tran-

script of one of such condemnation proceedings, stipulated to be similar in form to all the others, is made a part of the record herein. It shows that the title to that particular tract was acquired by the United States on or after May 14, 1934, which was *after* appellant had commenced work. The other important factor to be noted is that, included in the area of the project, are school lands of the state and also tribal lands, all of which have been taken over by the federal government and now form a part of the project.

At the seventy-fourth session of the United States Congress, an act was passed authorizing the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes. The act ratified and validated all contracts and agreements that had been theretofore executed in connection with the Grand Coulee dam project. H. R. 6732, Public Act 409. The work contemplated to be done upon the project by the United States was not in furtherance of any war measure or for the national defense, but simply for the improvement of navigation and for industrial recovery.

During the period of the construction work under his first contract, appellant maintained warehouses on ground within the project and at the dam site, where he stored and sold gasoline, oil, tires, and automobile accessories. Appellant paid the state a tax on these sales, the recovery of which forms a part of the basis of his first action.

At its regular session of 1933, the legislature of this state passed an act commonly known as the occupation tax act, chapter 191, Laws of 1933, p. 869, et seq. The act related to certain business activities "within this state." At its special session of 1933, the legislature amended the former act in certain respects. Chapter 57, Laws of 1933, Ex. Ses., p. 157 et seq. That act likewise applied to business activities "within this state." The latter act became effective January 18, 1934, which was shortly after appellant's first contract had been entered into, but before it was performed.

These two actions are in resistance to the application of either of these legislative acts to appellant's activities.

Appellant's first contention is that his construction or excavation contracts constituted sales of services, within the provisions of chapter 191, and that by § 5 of that act, read in connection with § 2 (2)(f), the proceeds of his contracts were exempt from the tax.

The answer to this contention is that the tax was not imposed under chapter 191 as it originally stood, but under chapter 57, § 1 (designated as § 2-a) (1), which clearly covers business activities of the kind engaged in by appellant, if "within this state." This contention of appellant is but briefly discussed by either counsel, and, we think, merits nothing further than what we have already said.

The principal, and only remaining, question in the case is whether appellant's activities took place "within this state." Specifically stated, the contention of appellant is that, by virtue of the United States constitution and the statutes of this state, the area contained within the project upon which the excavation and construction work was performed is under the exclusive jurisdiction of the United States, and that, therefore, any tax legislation of the state is wholly inoperative within the area of the project or upon any activities of appellant therein. Quotation of the specific constitutional and statutory provisions involved will first be made.

Art. I, § 8, clause 17, of the constitution of the United States provides that Congress shall have power:

> "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, *and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;* * * *" (Italics ours.)

Our reference to, and discussion of, this constitutional provision relate only to the latter, or italicized, portion of the quotation.

Rem. Rev. Stat., § 8108, adopted in 1891, provides that:

> "The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, * * * the consent herein and hereby given being in accordanee with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

It will be observed that the statute, while somewhat broader than Art. I, § 8, clause 17 in its designation of structures and purposes, nevertheless specifically recites that the con-

sent therein given is in accordance with the constitutional provision.

The provision of Art. I, § 8, clause 17, as above quoted and italicized, has been frequently construed by the United States Supreme Court, and it is now definitely settled and accepted that there are two ways in which lands within the jurisdiction of the state may become subject to the exclusive jurisdiction of the United States: (1) by purchase by the United States for certain specified purposes, with the consent of the state, and (2) cession of exclusive jurisdiction to the United States by the state. Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; United States *v.* Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761; Surplus Trading Co. *v.* Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091; Standard Oil Co. *v.* California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775.

From these cases, the following rules are deducible respecting jurisdiction over lands acquired by the United States for public uses: (1) When the land is acquired for one of the purposes within Art. I, § 8, clause 17, by purchase with consent of the state, federal jurisdiction is exclusive in such area for all purposes; (2) when the land is acquired for one of the purposes within that clause, but other than by purchase with the consent of the state, then federal jurisdiction is exclusive only to the extent of the purposes for which the land is held; (3) when the land is acquired for a purpose not within that clause, but by purchase with the consent of the state, then the United States has such jurisdiction over the land as may be ceded to it by the state; and (4) when the land is acquired for a purpose not within that clause, in any manner other than by purchase with the consent of the state, then the United States holds the land just as any other proprietor does, except that the land may not be taxed by the state. Our ultimate problem herein will be to determine under which one or more, if any, of these classifications, the present case falls.

Manifestly, the construction work involved in this case does not come within any of the uses implied in the descriptive terms of the constitutional provision, unless it can be said to come within the term "other needful buildings." If

the case were one of first impression, the rule of *ejusdem generis* would, in our opinion, exclude such work from the classification of "needful buildings" because the particular work was in no way connected with, or related to, forts, magazines, arsenals, or dockyards.

However, by judicial interpretation, over a long period of years, the term "needful buildings" has been applied to the following: a navy yard (Western Union Tel. Co. *v.* Chiles, 214 U. S. 274, 29 S. Ct. 613, 53 L. Ed. 994); a military hospital (Arlington Hotel Co. *v.* Fant, 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447); a military reservation (United States *v.* Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761); an army training and mobilization station (Surplus Trading Co. *v.* Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091); a custom house (Sham *v.* Hill, 24 Fed. 726); *locks and dams* (United States *v.* Tucker, 122 Fed. 518); a post office (United States *v.* Andem, 158 Fed. 996); a penitentiary (Steel *v.* Halligan, 229 Fed. 1011); an Indian training school (United States *v.* Wurtbarger, 276 Fed. 753); a military cemetery (Wills *v.* State, 50 Tenn. 141); a soldiers' home (Sinks *v.* Reese, 19 Ohio 306); a courthouse (State *v.* Mack, 23 Nev. 359, 47 Pac. 62).

While the structures mentioned in the foregoing cases are not specifically named in, and do not strictly fall within, the constitutional classification, it is, nevertheless, apparent that the particular structures or "buildings" in those cases, with the possible exception of one, are such as would necessarily require absolute and exclusive jurisdiction in the United States government, because their operation is in the discharge of a constitutional or governmental function, and there is no field for state participation or state legislation. The only possible exception in the list is the instance of locks and dams, involved in the Tucker case. But even in such case, if the locks and dams were owned and operated by the United States solely for the purpose of facilitating navigation, as they concededly were in that case, their function would likewise be a constitutional or governmental function. But irrigation, flood control, and power development (except insofar as the latter two are intended to promote navigation or else some war measure or the national

defense), while they may be of national interest and serve a public purpose, are not functions enjoined upon the federal government by the constitution, nor are they delegated to the United States by the constitution, nor is it necessary that they be committed, for their operation, to the exclusive jurisdiction of the United States government. Legislative power, with reference to such things, is reserved in the state.

Turning, now, to the statute above quoted, we note that the state has given its consent to the acquisition, by purchase or condemnation on the part of the United States, of lands for sites of locks, dams, etc., as well as for the purposes set forth in the constitutional provision. For present purposes, it may be conceded that the term "needful buildings" is broad enough, under the construction given to that term by the federal courts, to include locks and dams. It is very probable that specific mention of locks and dams was made in the statute in order to remove any doubt that may have existed generally at, and prior to, the time of the decision in the Tucker case, with respect to the inclusive extent of the constitutional provision.

The point that we make and stress here, and upon which we rest our ultimate conclusion herein, is that, while the statute conferred consent upon the United States to acquire land within the territory of the state, the state's power to cede jurisdiction is limited, by the statute, to these instances where it clearly appears that the land is to be used by the United States for a constitutional or governmental purpose. As stated in the leading case upon the subject, Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264, *supra:*

> "The essence of that provision [Art. I, § 8, clause 17, United States Constitution] is that the state shall *freely* cede the particular place to the United States for one of the specifically enumerated objects." (Italics ours.)

The question in this case, then, is whether, by reason of the conjunction of the constitutional provision, the statute, and the acquisition by the federal government of the lands within the project in the manner and for the purposes that the government acquired them, the state has been *ipso facto*

deprived of all jurisdiction with respect to such lands. However close the question may seemingly be, we are of the opinion that the state has not been deprived of all jurisdiction, but that it has a concurrent jurisdiction to the extent, among other things, that it has the right to impose a tax upon business activities conducted within the area of the project. The reason for this conclusion is based upon what we conceive to be fundamental principles of law and the conducive facts of this case.

By the enabling act of Congress, passed February 22, 1889, the territory of Washington became the state of Washington. Subject to the limitations and restraints of the federal constitution, the state, as such, has all the sovereign powers of independent nations over all persons and things within its territorial limits. Sturges *v.* Crowinshield, 4 Wheat. 122, 4 L. Ed. 529; New York *v.* Miln, 11 Pet. 102, 9 L. Ed. 648; Cummings *v.* Missouri, 4 Wall. 277, 18 L. Ed. 356. The area within, and under, the jurisdiction of a state may come under the exclusive jurisdiction of the United States by purchase by the federal government for a purpose prescribed by the federal constitution and with the consent of the state, or by cession of exclusive jurisdiction by the state to the United States. In either event, the land acquires a territorial status and ceases to be a part of the state, either territorially or jurisdictionally. Concessions Co. *v.* Morris, 109 Wash. 46, 186 Pac. 655. But, since self-preservation is the first law of nations and states, as well as of individuals, it will not be presumed, in the absence of clearly expressed intent, that the state has relinquished its sovereignty. Wills *v.* State, 50 Tenn. 141; *In re* Kelly, 71 Fed. 545; *Ex Parte* Gibbons, 56 Ark. 277, 19 S. W. 602; Barrett *v.* Palmer, 135 N. Y. 336, 31 N. E. 1017, 31 Am. St. 835, 17 L. R. A. 720 (Four of these cases are cited approvingly in the Concessions Co. case).

The power of taxation is an incident of sovereignty and inherent in the state, because government cannot exist or function without it. It is a legislative power following the more general power to make laws. State ex rel. Commissioners *v.* Clausen, 95 Wash. 214, 163 Pac. 744. The power of taxation is never to be suspended, surrendered, or contracted away. Amendment XIV, Washington constitution.

In the absence of constitutional restraint, the power of the legislature over taxation is as unlimited as the subject with which it deals. State ex rel. State Tax Commission *v.* Redd, 166 Wash. 132, 6 P. (2d) 619; 26 R. C. L. 27, § 13. The taxing power of the state is never presumed to have been relinquished unless the language in which the surrender is made is clear and unmistakable. Erie R. Co. *v.* Pennsylvania, 21 Wall. 492, 22 L. Ed. 595; 1 Cooley on Taxation (4th ed.) 159, § 60.

This is not a contest between the federal government and the state as to jurisdiction. It is a contest between the state, asserting its concurrent, or partial, jurisdiction, and an individual who asserts that exclusive jurisdiction rests in the federal government. So far from there being any contest as to jurisdiction between the two sovereign powers, the record discloses that they are working in harmony and accord, each exercising the field for which it is the better equipped and each, at the same time, recognizing the field of the other. The federal government, therefore, cannot possibly be prejudiced by the result of this action.

It appears from what we have already stated that prior to, at the time of, and at all times since, the inception of the project, the United States and the state have co-operated in every way in the development and construction of the dam and power plant. The federal government at present furnishes the money, supervises the work, and will, for a time, maintain the operation of the project. The state, on the other hand, has furnished a large amount of money for the preliminary work and now, through the Columbia Basin Commission, acts in an advisory capacity to the federal government in the further progress of the work. The state also has an option to take over the entire project when completed. The federal government is involved in a huge undertaking, the object of which is to promote navigation, develop power, and provide for irrigation. The state is likewise concerned. Navigation is a function that comes within the exclusive power of the federal government by virtue of the constitution of the United States. The development of irrigation and of power for industrial purposes, however, is within the reserved powers of the state. There is, thus, every reason why the federal government and the

state should co-operate, and, in order to do so, each must have proportionate jurisdiction.

> "We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty." South Carolina *v.* United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261.

On the other hand, if the state were excluded from all jurisdiction, the residents of the project would be without school facilities, police protection, and the right to vote, the workmen would be deprived of the benefit of industrial insurance, and the rules for sanitation would be suspended; for, if the state be wholly without jurisdiction, then it must follow that the state may not extend its privileges to the residents of the project nor expend its money in their behalf. Opinion of Justices, 42 Mass. 580; In re Town of Highlands, 22 N. Y. Supp. 137; Sinks v. Reese, 19 Ohio 306; State ex rel. Lyle v. Willett, 117 Tenn. 334, 97 S. W. 299; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091.

Furthermore, so far as the record supplies us with any information, the federal government did not acquire these lands until after the work of construction, under appellant's first contract, had been begun. Some of the lands, it appears, were not acquired until about the time that the work under the contract was completed. The record discloses that when appellant entered into the second contract, although all of the lands had then been acquired, the state was exercising its jurisdiction within the project at the in-

stance of the federal government itself. Moreover, it does not appear from the record that the federal government ever set apart any definite reserve as constituting the project, but, rather, that it appropriated lands from time to time as the necessities of the project required; this fact may not be a controlling one, but is nevertheless entitled to consideration.

The facts, taken as a whole, argue conclusively, in our opinion, that the state never intended to cede, and the United States never intended to take, exclusive jurisdiction over the project. Facts consistent with the retention, and inconsistent with cession, of exclusive jurisdiction by the state should, in the absence of any assertion by the federal government to the contrary, be construed most strongly in favor of the state, to the end that its territory be not diminished and that its jurisdiction in matters in which the federal government is not directly or immediately concerned be not entirely lost.

We conclude, therefore, that the purposes of the project, taken as a whole, do not fall exclusively within any of the enumerated classes mentioned above, so as to give the United States exclusive jurisdiction over the lands, but, rather in a class where several purposes are so intermingled as to call for the exercise of jurisdiction by both the federal government and the state, according as their respective interests and duties require. Insofar as the legislative acts in question are concerned, they are operative upon the business activities of the appellant within the project.

The judgments are affirmed.

STEINERT, *J.*

We concur:

MILLARD, *C. J.*
MAIN, *J.*
MITCHELL, *J.*
TOLMAN, *J.*
HOLCOMB, *J.*
BEALS, *J.*
BLAKE, *J.*
GERAGHTY, *J.*

APPELLANT'S BRIEF

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No. [redacted] 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

DAVID H. RYAN,

Appellant,

vs.

THE STATE OF WASHINGTON,

Appellee.

DAVID H. RYAN,

Appellant,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, THOMAS S. HEDGES, AND T. M. JENNER, CONSTITUTING THE TAX COMMISSION OF THE STATE OF WASHINGTON,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

B. H. KIZER,
Counsel for Appellant.

M. J. LUBY,
JAMES A. BROWN,
E. D. WEIGLER,
Of Counsel.

Post Office Address:
611 Paulsen Building,
Spokane, Washington.

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No. 774

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

I.

OPINION OF THE COURT BELOW.

The final opinion of the Supreme Court of the State of Washington in these cases (R., p. 36) is reported in 88 Washington Decisions at page 75.

II.

JURISDICTION.

Appellant refers to the statement as to jurisdiction which is a part of the record and printed separately.

III.

WASHINGTON STATUTES INVOLVED IN THIS APPEAL.

Section 8108 of Rem. Rev. Stat., which provides for the acquisition by the United States of real estate within the State of Washington for the purposes within Article I., Section 8, Clause 17 of the United States Constitution, and for the further purpose of improvement of the navigable rivers and harbors in the State of Washington, reads as follows:

> "The consent of the State of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy yards, naval stations, or other needful buildings authorized by any act of congress . . . the consent herein and hereby given, being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United

States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

Section 2a of Chap. 57, the Laws of Washington, Extraordinary Session, 1933, p. 157, which provides for an excise tax upon the gross income from business transacted in the State of Washington, is as follows:

"Section 2a. (1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business not specifically taxable under Section 2 of this act, an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *"

IV.

STATEMENT OF THE CASE.

The Columbia is the second largest river in the United States. It is navigable in law and in fact. In 1932 the United States Army Engineering Corps made a report to the Secretary of War embodying a comprehensive plan to improve navigation of this river, including the construction of ten dams to store the flood waters, to be released in time of slack water,

and providing for development of hydroelectric energy as a means of repaying the cost of the improvement and of furnishing irrigation for a large tract of arid land.

The two key dams mentioned in this plan, one at Bonneville, Oregon, on the boundary between Oregon and Washington, and one at Grand Coulee, in the State of Washington, are now under construction, and out of the construction of the Grand Coulee Dam these cases arise.

These two cases involve the same questions of law and substantially the same questions of fact. They were consolidated for trial and also upon appeal to the Supreme Court of the State of Washington. All facts were stipulated in open court upon the trial and are a part of record. There was also tried at the same time the case of Silas Mason Company, Incorporated, et al., vs. Tax Commission of the State of Washington, a companion case to these now on appeal in this court, and the record contains the stipulated facts in all three cases, with the agreement of counsel that any facts stipulated upon said trial might be used in either of said cases where relevant and material.

In the fall of 1933 the United States Department of Interior let a contract to appellant, a resident of San Diego, California, for removal of the overburden at either end of the proposed Grand Coulee Dam to be constructed across the Columbia River in the State of Washington. Work was started under this contract by appellant about January 1st, 1934, and completed in the spring of that year.

All of this contract was performed through subcontractors. During its performance appellant maintained at the site of the operations a warehouse, where he stored and sold gasoline, oil, grease, automobile tires and accessories. All of the land upon which appellant performed the contract and stored and sold the merchandise had been acquired by the United

States, with consent of the State of Washington, prior to commencement of performance by appellant, by purchase or condemnation, for the purpose of the construction of the dam and the necessarily appurtenant structures, and during all of said time appellant had his place of business upon such ground, where he transacted all his business and received all his income; appellant maintained a small staff of employees to supervise the work and to handle the merchandise. (R., p. 11.) He was required by his contract to (R., p. 26) and did report such payroll to the Department of Labor & Industries of the State of Washington and paid the required insurance premiums thereon. (R., p. 8-11.)

The Tax Commission of the State of Washington made and served upon appellant an assessment in the sum of $4,012.25, on account of excise tax of ½ of 1% on gross income received by him as proceeds of payments from the United States on said contract and from sales of merchandise under Section 2a (1), Chap. 57 of Laws of Washington, Extraordinary Session of 1933. Appellant paid said assessment, and in accord with the procedure outlined in said taxing act, petitioned for return of said sum, and upon the petition being denied brought suit for recovery of same.

In the summer of 1934, and after completion of the first contract, appellant was awarded a second contract by the Department of the Interior to build a "construction railroad" from the Northern Pacific Railway line at Odair, Washington, to the dam-site, to be used in transporting materials and supplies necessary for construction of the dam and for its maintenance after completion. The entire performance of this contract was upon land acquired by the United States by purchase or condemnation for the construction of the railroad. Appellant performed this work himself, and, as required by his contract, reported his payrolls to the Department of

Labor & Industries of the State of Washington and paid insurance premiums thereon. During the performance of the first part of the contract appellant maintained his office at Coulee City, Washington, and off the right-of-way, but later moved the office back to the damsite and upon government property, where it remained until the completion of the work. (R., p. 15.)

The Tax Commission of the State of Washington made demand on appellant that he make returns of his gross receipts from said contract, and he brought action to restrain the Commission from attempting to collect any tax thereon. These actions were dismissed by the Trial Court, and the judgments were affirmed by the Supreme Court of the State of Washington.

V.

QUESTIONS PRESENTED TO THE SUPREME COURT OF WASHINGTON.

Two questions were presented to the Supreme Court of the State of Washington, and both were decided adversely to appellant.

1. Was the levy of the occupation tax upon the gross income received by appellant under his contracts with the United States a direct burden upon the United States, and therefore illegal and void?

2. When the United States acquired the land, upon which appellant performed all his work and received all his income, by purchase with consent of the State of Washington, for the purpose of construction of a dam with appurtenances to improve the navigation of the Columbia River, and the State of Washington ceded jurisdiction over lands acquired by the United States in the improvement of the rivers and harbors of the State, can the State of Washington levy a valid tax upon appellant based upon his gross income so received?

VI.

SPECIFICATION OF ERRORS.

The errors assigned in the record which appellant intends to urge, and upon which appellant relies for reversal of the judgment in these cases are:

1. The Supreme Court of the State of Washington erred in not holding that under Article I., Section 8, Clause 17 of the Constitution of the United States the United States had exclusive jurisdiction over lands within the territorial jurisdiction of the State of Washington acquired by the United States by purchase or condemnation with the consent of the State of Washington, under Section 8108, Remington's Revised Statutes of the State of Washington, for the purpose of construction of the Grand Coulee Dam, with necessary appurtenant buildings and structures, for the improvement of navigation of the Columbia River, upon which lands so acquired and held the said David H. Ryan, appellant herein, performed all the work and received all the income on which the State of Washington has levied and seeks to levy an excise tax.

2. The Supreme Court of the State of Washington erred in not holding that the United States had exclusive jurisdiction over lands within the territorial jurisdiction of the State of Washington acquired by the United States by purchase or condemnation for the purpose of the construction of the Grand Coulee Dam, with the necessary appurtenant buildings and structures, for the improvement of navigation of the Columbia River, jurisdiction over which was ceded to the United States by the State of Washington under Section 8108, Remington's Revised Statutes of the State of Washington, and upon which lands so acquired and held the said David H. Ryan, appellant herein, performed all the work and received all the income on which the State of Washington has levied and seeks to levy an excise tax.

3. The Supreme Court of the State of Washington erred in holding that the said David H. Ryan, appellant herein, was liable to pay to the State of Washington, an excise tax under Section 8370-1, *et seq.*, Remington's Revised Statutes of the State of Washington, Chapter 191, Session Laws of the State of Washington for 1933, as amended by Chapter 57 Extraordinary Session of 1933, on account of gross income received by him for work done and merchandise sold wholly upon and within the confines of land acquired by the United States by purchase or condemnation within the territory of the State of Washington with the consent of the State of Washington and with jurisdiction thereon ceded by the State of Washington to the United States by virtue of Section 8108 Remington's Revised Statutes of the State of Washington and in accordance with Article I., Section 8, Clause 17 of the Constitution of the United States, for the purpose of the construction of the Grand Coulee Dam for improvement of navigation of the Columbia River, together with the necessary buildings and structures appurtenant thereto.

4. The Supreme Court of the State of Washington erred in dismissing the action of appellant David H. Ryan herein: First: To recover back money paid to appellee, The State of Washington, on account of an assessment made therefor by the Tax Commission of the State of Washington for excise taxes alleged to be due from said appellant, and, Second: To restrain the appellees, the Tax Commission of the State of Washington and Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, constituting said Tax Commission, from collecting or attempting to collect any further excise taxes from appellant; on the ground that all income earned and received by appellant within the State of Washington was so earned and received by him wholly upon and within the confines of lands acquired by the United States by purchase or condemnation with the consent of the State of Washington and with jurisdiction thereover ceded

by the State of Washington to the United States under Section 8108, Remington's Revised Statutes of the State of Washington, and in accordance with Article I., Section 8, Clause 17 of the Constitution of the United States, and that the said action of appellees, State of Washington and its Tax Commission, in collecting and seeking to collect said tax is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant, David H. Ryan, of his property without due process of law and denies to him equal protection of the laws.

5. The Supreme Court of the State of Washington erred in not holding that the occupation tax levied and collected or sought to be levied and collected by the appellees, being a tax upon the gross income of the appellant received under contracts with the United States, constituted a direct burden upon the United States and was therefore illegal and void.

VII.

SUMMARY OF ARGUMENT.

While two questions are raised on this appeal, only one will be argued at length. The question as to the tax being a direct burden upon the United States will be fully argued in the case of Silas Mason Company, Incorporated, *et al., vs.* Tax Commission of the State of Washington, the companion case to these, which is now on appeal in this court.

The main question argued herein is whether the State of Washington can levy a valid tax against appellant, based upon his gross income from work done and business transacted upon lands acquired by the United States by purchase with consent of the State, for improvement of navigation of the Columbia River, and over which the State had ceded jurisdiction to the United States by Section 8108 of Remington's Revised Statutes of Washington. The points will be argued as follows:

1. The levy of an occupation tax of a fixed percent of the gross income of appellant, received as the stipulated payment from the United States for the performance of two contracts is a direct burden upon the United States.

2. The Grand Coulee Dam area, having been acquired by the United States by purchase with consent of the State of Washington for the purpose of improvement of navigation of the Columbia River, and the State of Washington having ceded jurisdiction to the United States over lands acquired for improvement of the rivers and harbors of the State, such area is not within the State of Washington and a tax levied by the State on persons or property therein is void.

VIII.

ARGUMENT.

The levy of an occupation tax of a fixed percent of the gross income of appellant, received as the stipulated payment from the United States for the performance of two contracts is a direct burden upon the United States.

The rule that the states have no power to burden the United States in any operations involving the proper exercise of its constitutional powers was established in McCulloch *vs.* Maryland, 4 Wheat., 316.

It is likewise established that a tax measured by gross receipts is a direct burden upon the business affected; United States Glue Company *vs.* Town of Oak Creek, 247 US., 321; 38 S. Ct. 499; 62 L. Ed., 1135, and where the business in question is a contract with the United States involving the performance of a governmental function such a tax is a direct burden upon the United States and therefore void; Dravo Contracting Company *vs.* Fox, 16 Fed. Sup. 527.

As stated before, this question is fully presented in the case of Silas Mason Company, Incorporated, *et al.*, *vs.* Tax Commission, on appeal in this court. Appel-

lant herein adopts the brief and argument of the appellants in that case, and will present no further argument thereon.

The Grand Coulee Dam area, having been acquired by the United States by purchase with consent of the State of Washington for the purpose of improvement of navigation of the Columbia River, and the State of Washington having ceded jurisdiction to the United States over lands acquired for improvement of the rivers and harbors of the State, such area is not within the State of Washington and a tax levied by the State on persons or property therein is void.

But there is an additional and more comprehensive reason why the decision of the Supreme Court of Washington should be reversed. It is more comprehensive because the decision will determine the right of the State of Washington to levy this excise upon the proceeds of appellant's sales of merchandise and to levy ad valorem taxes upon the property situated on lands within this area.

Counsel have stipulated that all of the lands upon which these contracts were performed by appellant were acquired by the United States, prior to commencement of the work, by purchase with the consent of the State of Washington for the purpose of construction of a dam, with necessary appurtenances, across the Columbia River; that all of the land upon which appellant performed his contracts was necessary for the construction of said dam and appurtenances, and that the contracts of appellant were a necessary part of said construction; that all of appellant's work was above the high-water mark of the river; that appellant was not a resident of the State of Washington, and that all his work was performed and all his income was received within the confines of the land so acquired by the United States. (R., p. 8-9.)

In the case of Fort Leavenworth Railroad Company *vs.* Lowe, 114 U. S., 525; 5 S. Ct. 995; 29 Law Ed.,

264, Mr. Justice Field, in a very able and comprehensive opinion, set forth the varying conditions under which the United States would or would not have exclusive jurisdiction over land acquired by virtue of Article I., Section 8, Clause 17, of the Federal Constitution. That decision has ever since been regarded as the leading case upon the interpretation of Clause 17. From it certain rules may be clearly deduced, which appellant believes are properly set out in the opinion of the Supreme Court of Washington as follows:

> "From these cases, the following rules are deducible respecting jurisdiction over lands acquired by the United States for public uses: (1) When the land is acquired for one of the purposes within Art. I., Sec. 8, Clause 17, by purchase with consent of the state, Federal jurisdiction is exclusive in such area for all purposes; (2) when the land is acquired for one of the purposes within that clause, but other than by purchase with the consent of the state, then Federal jurisdiction is exclusive only to the extent of the purposes for which the land is held; (3) when the land is acquired for a purpose not within that clause, but by purchase with the consent of the state, then the United States has such jurisdiction over the land as may be ceded to it by the state; and (4) when the land is acquired for a purpose not within that clause, in any manner other than by purchase with the consent of the State, then the United States holds the land just as any other proprietor does, except that the land may not be taxed by the state." (R., p. 44.)

If it shall appear, therefore, that this land was acquired for one of the purposes set forth in Clause 17, the exclusive jurisdiction of the United States thereover necessarily follows. Out of the purposes named in Clause 17 the only one under which the present acquisition may be placed is that of "other needful build-

ings." Under and included within the scope of this phrase the courts have placed the following:

Post Offices and Federal Court Houses, State *ex rel* Jones *vs.* Mack (Nev.) 47 Pac., 763.

Soldiers Homes, People *vs.* Mouse (Cal.) 265 Pac., 944.

Indian Schools, United States *vs.* Wurtzbarger, 276 Fed., 753.

Customs House, Sharon *vs.* Hill, 24 Fed., 726.

Federal Penitentiary, Steele *vs.* Halligan, 229 Fed., 1011.

Military Cemetery, Wills *vs.* State, 50 Tenn., 141.

Locks and Dams, United States *vs.* Tucker, 122 Fed., 518.

A careful search has revealed only the case of United States *vs.* Tucker, *supra.*, where locks and dams were considered in connection with Clause 17, until the recent case of Atkinson *et al. vs.* State Tax Com. of Oregon, 62 Pac. 2nd, 13. (*Reversed on rehearing, April 6th*, 1937.)

The Tucker case has been cited numerous times, and has never been modified or overruled. It is strictly in point here, and the court, in its decision, makes the following pertinent comment:

> "While there might possibly be some difficulty, if the question was *res integra,* as to the strictly proper construction and applicability to the case of locks and dams of the words 'for the erection of forts, magazines, arsenals, dock yards, and other needful buildings' used in the clause of the Constitution above quoted, the cases seem to leave no doubt that the broadest construction has been wisely put upon that language—one which makes it cover all structures and all places necessary for carrying on the business of the national government."

From the language of the decisions on this question it seems to be a proper deduction that whenever the

government acquires land for a governmental, as distinguished from a proprietary function, and the acquisition is by purchase with consent of the State, exclusive jurisdiction in the Federal Government follows, as of course.

An examination of the record of the purpose of this project discloses the following:

1. On March 29th, 1932, the Chief of the Corps of United States Army Engineers reported to the Secretary of War, regarding plans for development of the Columbia River, stating that "The primary purpose of this report is 'the formulation of general plans for the most effective improvement of the river for the purposes of navigation, and the prosecution of such improvement, in combination with the most efficient development of the potential water power, the control of floods, and the needs of irrigation'."

2. In the condemnation proceedings by the United States to acquire a part of the lands for this project, the complaint and declaration of taking (R., p. 25) recite the purpose of acquiring same to be for flood control, improvement of navigation, development of electric energy, and irrigation. The particular proceeding shown does not cover lands upon which appellant worked, but is stipulated to be typical of all such proceedings. (R., p. 13.)

3. The Act of Congress passed August 30th, 1935, (H. R. 6732) authorizing and confirming the project, provides:

> "Sec. 2. That for the purpose of controlling floods, improving navigation, regulating the flow of the streams of the United States, providing for storage and for the delivery of the stored waters thereof, for the reclamation of public lands and Indian Reservations, and other beneficial uses, and for the generation of electric energy as a means of financially aiding and assisting such undertakings, the projects known as "Parker Dam" on the Colorado River, and "Grand Coulee

> Dam" on the Columbia River, are hereby authorized and adopted, and all contracts and agreements which have been executed in connection therewith are hereby validated and ratified, and the President, acting through such agents as he may designate, is hereby authorized to construct, operate, and maintain dams, structures, canals, and incidental works necessary to such projects, and in connection therewith to make and enter into any and all necessary contracts including contracts amendatory of or supplemental to those hereby validated and ratified. * * *"

4. A proposed contract between the Columbia Basin Commission, representing the State of Washington, and the United States (R., p. 26), which would give the State of Washington an option to purchase all of the power developed in excess of the needs of the United States, reiterates the purposes of such construction to be for "improvement of navigation, flood control, power development, and ultimately for irrigation," recites in considerable detail the purposes and method of development of the project, and provides the permanent control of same shall remain in the United States, with the State of Washington contributing its pro rata share of cost of operation, if the option to purchase power is exercised by it.

The record conclusively establishes that the primary purpose of the project is a governmental one, namely: improvement of navigation. This was conceded by the Washington Supreme Court when it said, "for present purposes, it may be conceded that the term 'needful buildings' is broad enough, under the construction given to that term by the Federal Courts, to include locks and dams." (R., p. 46.)

Where a governmental purpose is set forth in an Act of Congress as one of the reasons for passage of the act, such purpose may not be inquired into or denied;

Arizona *vs.* California, 283 U. S., 423, 51 S. Ct. 522, 75 Law Ed., 1154,

and the fact that electric energy that comes into being in the operation of works constructed under constitutional authority will be sold is not in derogation of the right of construction.

Ashwander *vs.* Tenn. Valley Authority, 297 U. S. 288, 56 S. Ct. 466, 80 Law Ed., 688.

That improvement of navigation is a governmental function is so firmly established that no citations of authority are necessary.

Appellees urge that because the State of Washington has furnished considerable money to pay for some of the preliminary investigations before the project was taken over by the Federal Government, and because this State is doing the policing of the area and furnishing the educational facilities, and because appellant was required by his contract to carry compensation insurance on his payroll with the State of Washington, these facts show that concurrent jurisdiction was reserved to the State over the area. This argument is wrong in two particulars. In the first place, if the Federal Government acquired exclusive jurisdiction by reason of the constitutional provision it can only be surrendered by an abandonment of the area by the government for the purpose for which it was acquired, or by an Act of the Congress retroceding jurisdiction,

In re Ladd, 74 Fed., 31;

United States *vs.* Unzeuta, 281 US., 138; 50 S. Ct. 284; 74 Law Ed., 761,

and neither of these conditions have happened. Secondly, why should the government object if the State voluntarily takes unto itself some of the duties and expenses of the educational and social needs of the area? That is not a challenge to the jurisdictional rights of the government, and the record is silent

as to any such claim of the State ever officially coming to its attention. As to industrial insurance, the Federal Government has no compensation applicable to work such as this and could make such reasonable requirements of appelant thereto as it might desire. Moreover, the Washington Supreme Court had held in

> Nickell *vs.* Department of Labor & Industries, 164 Wash., 589; 3 Pac. 2nd, 1005, and
>
> State *ex rel* Construction Co. *vs.* Department of Labor & Industries, 167 Wash., 507; 10 Pac. 2nd, 213,

involving contracts performed on lands belonging to the United States that the contractors must carry state industrial insurance.

The question of jurisdiction seldom arises save on criminal and tax matters, and the United States is almost never a party to such proceedings unless its asserted right to criminal jurisdiction is opposed. But that does not mean that any individual, believing that the State is attempting to invade his constitutional rights, may not deny and have the Federal Courts pass upon the jurisdictional right of the State over the matter involved.

If, therefore, the construction of this dam is to improve the navigation of the Columbia River, as the Congress has declared, it is the exercise of a governmental function and the exclusive jurisdiction thereover must be by law vested in the United States.

> Surplus Trading Co. *vs.* Cook, 281 US. 647, 50 S. Ct., 455, 74 L. Ed. 1091.
>
> Concessions Co. *vs.* Morris, 109 Wn. 46, 186 Pac. 655.

Section 8108 of Rem. Rev. Stat. of Washington provides that, "The jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set

apart by the general government for any or either of the purposes before mentioned;" and then reserves the right to serve process on such lands.

In the third rule deduced from the Fort Leavenworth Railroad and following cases, the Washington Supreme Court correctly says: "(3) When the land is acquired for a purpose not within that clause, (Clause 17), but by purchase with the consent of the State, then the United States has such jurisdiction over the land as may be ceded to it by the state." (R., p. 44.)

If this court should be of the opinion that the project in question does not constitute "other needful buildings" then the United States still is a purchaser of land with consent of the State for the site of a dam to improve one of the rivers of the State, with jurisdiction ceded by the State. As was clearly pointed out in U. S. *vs.* Tucker, 122 Fed., 518, it makes no difference whether jurisdiction was acquired by reason of the improvement being another "needful building" and therefore within the actual letter of the Constitution, or by virtue of an express cession by the State. Under either theory *jurisdiction was acquired.*

Appellees assert that the failure of the State of Washington to specifically state that it ceded *exclusive* jurisdiction means that the only cession was of concurrent jurisdiction. However, the State reserved the right to serve process on such lands. It is a cardinal rule of construction that the court shall give effect to the general intent of an act. Here the intent seems plain. If the legislature had intended to grant only concurrent jurisdiction it would have so stated, but when it reserved the right to serve process, all that was not reserved must be considered as intended to be ceded.

> "It is well settled that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted and excludes all other exceptions." (25 R. C. L. 983.)

There are other cases where the statutory words of cession were the same as here, and the cession was regarded as of exclusive jurisdiction. Although the question of exclusiveness was necessarily involved, the construction of the cession was not mentioned in the opinions, apparently being considered as being exclusive.

U. S. *vs.* Unzeuta, 281 US., 138, 50 S. Ct. 284, 74 L. Ed. 761;

In re Ladd, 74 Fed. 31;

School District No. 20 *vs.* Steele, 195 NW. 448.

Winston Bros. Co. *et al., vs.* State Tax Com. of Oregon *et al* 62 Pac. 2nd-7.

The right of a state to cede jurisdiction was considered by Justice Field in the Fort Leavenworth case, *supra.,* where, speaking concerning lands held for public uses, he said:

> "As instrumentalities for the execution of the powers of the General Government, they are, as already said, exempt from such control of the states as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the legislature of the state. Such cession is really as much for the benefit of the State as it is for the benefit of the United States."

This view was concurred in by the Washington Supreme Court in Concessions Company *vs.* Morris, 109 Wash., 46; 186 Pac., 655, where the following comments were made:

> "As was decided in Fort Leavenworth R. *vs.* Lowe, above, the legislatures of the various states have power to cede sovereignty to the Federal Government of any territory within the state,***"

And again, speaking of the same decision, the court said:

> "That case establishes * * * that the various states can cede to the Federal Government sovereignty over lands which are held in Federal proprietorship, with such limitations upon that cession of sovereignty as the state may impose, * * *"
>
> See also Yellowstone Park Trans. Co. *vs.* Gallatin Co., 31 Fed. (2nd) 644.

The improvement of rivers and harbors within the state must be considered as a benefit to the state. Therefore, whether such work is held a governmental function or not, certainly it is ample consideration to warrant the cession of jurisdiction, if such be needed to validate the solemn pronouncement of the legislature. But as has been heretofore demonstrated, the purpose of the United States in acquiring these lands was governmental, and that not only complied fully with Clause 17, but is also a complete answer to the Washington Supreme Court's objection to the validity of the cession.

IX.

CONCLUSION.

Appellant submits that the record in these cases conclusively shows that he performed all his work and received all his income within the territory acquired by the United States by purchase with the consent of the state, for the operation of a governmental function; that the United States necessarily acquired exclusive jurisdiction over such territory, and that it was therefore *not within the State of Washingon.* But if the improvement should not be deemed a governmental function the state has ceded its jurisdiction over such area to the United States and there has been no retrocession of same nor abandonment of the project.

No sufficient reason has been advanced why it is necessary or even advisable that the State should have concurrent jurisdiction over this area. For a century and a half the Federal government has been taking very adequate care of the inhabitants of its reservations. This attempt of the State of Washington to repudiate its own legislative act comes with poor grace when it appears from the face of the act that it is for the benefit of the State as well as of the United States.

Appellant prays that the judgment be reversed with costs.

Respectfully submitted,

B. H. KIZER,
Counsel for Appellant.

M. J. LUBY,
JAMES A. BROWN,
E. D. WELLER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, et al.,
Appellants,
against
TAX COMMISSION OF THE STATE OF WASHINGTON, et al.,
Appellees.

DAVID H. RYAN,
Appellant,
against
THE STATE OF WASHINGTON, et al.,
Appellees.

Nos. 7, 8.

REPLY BRIEF ON BEHALF OF APPELLANTS

JOHN W. DAVIS,
B. H. KIZER,
J. ARTHUR LEVE,
E. D. WELLER
Counsel for Appellants.

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IN THE

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OCTOBER TERM, 1937

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, et al., *Appellants,* against TAX COMMISSION OF THE STATE OF WASHINGTON, et al., *Appellees.*	Nos. 7, 8.
DAVID H. RYAN, *Appellant,* against THE STATE OF WASHINGTON, et al., *Appellees.*	

REPLY BRIEF ON BEHALF OF APPELLANTS

By virtue of an order of this Court entered on June 1, 1937, these cases have been assigned for reargument, with direction to the Clerk "to give notice to the Attorney General of the United States who is requested to present the views of the Government upon the questions (1) as to jurisdiction over the areas in which the work of the several contractors is being performed, and (2) whether the state tax imposes a burden upon the Government."

Because of the identity of the questions of law and fact, a joint brief is being presented by the appellants, and in view of the brief submitted by the Attorney General of the United States it seems advisable to present a recapitulation of the facts conceded, stipulated or admitted.

Facts.

The Columbia River, the second largest in the United States, has its source in lakes in British Columbia, which in turn are fed from mountain streams and lakes of the Rocky Mountains in both Canada and the United States. Because of its physical characteristics partaking in its upper reaches of the character of a mountain stream, with great falls, swift current and intervals of rapids, the alternations in its flow depend upon the melting of snow in the mountains, which make it difficult, if not often impossible, to have navigation of the complete stream without such improvements as are now under construction. The principal tributary of the Columbia is the Snake River which possesses the same characteristics as the Columbia River.

The Columbia, as a result of improvements that have been made and are now in contemplation, is commercially navigable from its mouth to the advent of the Snake, and the Snake from its junction with the Columbia to the confluence of the Snake in clear water. Above the mouth of the Snake the Columbia is navigable from pool to pool as far as the mouth of the Okanogan River, which in turn is navigable for some distance, but all of the navigation is difficult and not commercially feasible because of the conditions above described.

The Columbia River, for the major part of its course within the United States, traverses an arid country which due to the quality of its soil would become immensely productive and rich if placed under irrigation.

The course of the Columbia in the United States, for the greater part of its length, lies wholly within the State of Washington, and very shortly below the mouth of the Snake the Columbia is the boundary between the States of Washington and Oregon. Prior to the great enterprise which has been the cause of these cases being before this Tribunal, sporadic improvement extending over many years had been

visited upon the Columbia River. Most of that work was done by the United States for the improvement of navigation. This project was first investigated in 1903 by the Bureau of Reclamation. In 1918 agitation for a thorough study of the project was renewed, and in 1919 and 1920 the Columbia Basin Commission of the State of Washington made the first real survey. Subsequent reports were made from time to time, and finally in 1929 the War Department, acting through a corps of engineers, began an exhaustive investigation of the uses of the Columbia River, including a study of the Columbia Basin project. In July, 1931, the District Engineer of that corps made his report to the Chief of Engineers of the War Department, in which he found the Columbia Basin project to be a feasible one, and the Chief of Engineers on March 29, 1932, recommended to the Secretary of War a comprehensive plan for the development of the Columbia River to consist of ten dams, including power dams located at Grand Coulee and other places, which would make the River navigable and develop forty-two billion kilowatt-hours annually, or approximately one-third of the total electric power produced in the United States in 1930.

On June 8, 1933, Harold L. Ickes was appointed to the office of permanent Administrator of Public Works. Thereafter the President of the United States, under authority of the National Industrial Recovery Act and particularly by virtue of Sections 201, 202 and 203 of said Act, directed the Administrator of Public Works to include in the Public Works program, enumerated in and contemplated under Section 202, the Grand Coulee Dam and Power Plant of the State of Washington as a part of the Columbia River project in such State.

The project finally recommended by the War Department and the Department of the Interior contemplated among others the following features:

(a) The Dam across the Columbia River at the Grand Coulee, State of Washington, to be 370 feet high above low

water and 4,290 feet long on the crest and to contain eleven million cubic yards of concrete. (The Dam as actually constructed will be 550 feet high.)

(b) The power plant installed to develop 2,100,000 Horse Power; greater than the combined developments of either Niagara Falls or Boulder Dam.

(c) The total cost of the project to be $392,000,000.

The Grand Coulee Dam is the key dam on the Columbia River and will create a lake 150 miles long, reaching the Canadian boundary. By drawing down the reservoir thus created to a depth of eighty feet in the wintertime, when the flow of the Columbia is at its lowest, over five million acre feet of storage becomes available, which release will double the prime power of the Columbia River downstream to the Snake River and add more than 50% to the power of the Columbia below the Snake. The storage afforded by the Grand Coulee Dam will have an appreciable effect on reducing floods on the whole River. There will be 905,500 acres of first-class land available for irrigation.

On November 1, 1933, the Secretary of the Interior signed a memorandum addressed to himself as Federal Emergency Administrator of Public Works, in which, as the Second Report of the Columbia Basin Commission (No. 7, Pltffs.' Exh. E, p. 14) states, "After reciting that it was evidently the intention of the Public Works Administration to make the construction of the Grand Coulee Project a Federal project * * *, the Secretary recommended that the project be considered a Federal project to be constructed, operated and maintained by the Bureau of Reclamation."

On December 12, 1933, the Secretary of the Interior and Federal Emergency Administrator of Public Works signed "an amended Declaration of Taking in the case of the United States of America versus Continental Land Company, et al., in which he stated that certain lands at the Grand Coulee Damsite to the extent of 840.28 acres

'are hereby taken for the use of the United States' in the construction of a dam at the Grand Coulee Damsite for the regulation and control of the flow of the Columbia River, for a storage reservoir from the damsite to the Canadian Boundary, for the improvement of navigation, for flood control, etc. * * *." That Declaration was filed on December 19, 1933, in the United States District Court for the Eastern District of Washington, Northern Division, and as a result the United States immediately acquired the title and possession of part of the lands involved. (No. 7, Pltffs.' Exh. E, pp. 14, 15). Similar Declarations later filed resulted in further acquisitions.

On January 4, 1934, Senator Dill announced that Public Works Administrator Ickes had informed him on that date that the Grand Coulee Project had formally and officially been declared a Federal project by resolution of the Public Works Administration, and henceforth would be carried forward wholly on that basis. (No. 7, Pltffs.' Exh. E, p. 15.)

On January 4, 1934, the First Assistant Secretary of the Interior signed a notice addressed to the Commissioner of Public Lands of the State of Washington giving notice that the United States intended to make examinations and surveys for the utilization of the waters of the Columbia River and its tributaries in the development of the proposed Columbia Basin Project, and attached to said notice a list of lands owned by the State of Washington required for the construction of the Grand Coulee high dam, which notice was given pursuant to Sections 7410, 7411, 7412 and 7413 of Remington's Revised Statutes of Washington, and was filed immediately thereafter with the Commissioner of Public Lands of the State of Washington.

And finally, the project received the express approval of Congress by the Act of Aug. 30, 1935, c. 831, 49 Stat. 1028 (quoted in Govt. Brief, p. 91).

Shortly after the inclusion of the Grand Coulee Project in the Public Works program, the Department of the In-

terior prepared Specifications No. 570 for the construction of a part of the work thereon and called for bids for such work. Among others, the appellants, Silas Mason Company, Inc., Walsh Construction Company, and Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, copartners as Atkinson-Kier Company, bid on the work and their bid was accepted (No. 7, R. 88; Pltffs.' Exh. A).

On July 16, 1934, a contract (No. 7, Pltffs.' Exh. A) was duly entered into by the United States of America and appellants (other than Mason-Walsh-Atkinson-Kier Company), whereby they agreed to furnish labor and materials and to perform all work required for the construction of that part of the Grand Coulee Dam and Power Plant as covered by Items 1 to 85, inclusive, of the schedule of Specifications 570, for the Columbia Basin Project, and were to receive $29,339,301.50 as a consideration for the performance of the work and for such labor and materials supplied.

This contract contained a number of specifications under which, among other things, the United States undertook and agreed to furnish a large part of materials necessary for the construction of the Dam and Power Plant, and the contractor to supply the remainder of such materials and perform all work essential for its construction.

The contract gave the Government the right to terminate it at any time prior to the completion of the Grand Coulee Dam to its full height. But, in that event, the contractor was to turn over to the Government all its plants, tools, etc., and the Government was obligated to pay to the contractor the total actual cost less revenues from rentals, leases and concessions to the date of such termination, plus 10% of such total cost. (No. 7, R. 11.)

Among the many obligations imposed upon the contractor were:

> The construction, maintenance and operation of office and headquarter buildings, warehouses, garages, commissary, hospital, dormitories, boarding houses

and homes for employees, upon a tract of land designated by the Government, all subject to the approval of the contracting officer (Federal Officer in charge). (No. 7, Pltffs.' Exh. B, Spec. 35.)

The grading, surfacing and maintenance of the streets in the camp site, as in the opinion of the contracting officer may be required to provide for safe and satisfactory use by the public. (Spec. 35.)

The construction, operation and maintenance of a complete water system in order to supply the camp site with water for domestic, fire protection and irrigation purposes, all subject to the approval of the contracting officer. (Spec. 37.)

The construction, operation and maintenance of a complete sewer system, subject to the approval of the contracting officer. The method of discharge of the sewers into the Columbia River to conform to the laws and regulations of the Health Department of the State of Washington, but the point of discharge to be subject to the approval of the contracting officer. (Spec. 38.)

Any leases of space in buildings erected and owned by the contractor, subject to the approval of the contracting officer, such leases to contain provisions making them subject to termination if, in the opinion of the contracting officer, the lessee should be guilty of misconduct or infraction of the law. (Spec. 39.)

The contractor to make all necessary arrangements with the proper State and County authorities for school facilities and instruction for the families of the contractor's employees and other residents in the camp site, to be furnished without charge and subject to the approval of the contracting officer. (Spec. 42.)

Police protection for the contractor's camp for the area involved in and surrounding the construction work covered by the specifications to be furnished by the Washington State Patrol in cooperation with the Government. The contractor, however, was to provide and maintain, without charge therefor, such jail facilities satisfactory to the Washington State Patrol as may be required and to cooperate with the Washington State Patrol and the Government in the maintenance of law and order. (Spec. 43.)

The specifications provided further:

> "The contractor may, with the consent of the contracting officer, use * * * any land which is the property of the Government." (Spec. 45).
>
> That a railroad would be constructed by the Government and, when completed, it was to be turned over to the contractor who was to assume its operation and maintenance. All operations of the contractor in connection with the railroad were to be subject to the approval of the contracting officer. (Spec. 51.)

As each of appellants who signed that contract had no prior business connection or interrelation with the other save that the three organizations made a joint bid for the Grand Coulee Dam, it became necessary to create a joint agency to carry on the work in their behalf. To that end, the signatories caused to be organized the appellant, Mason-Walsh-Atkinson-Kier Company, as a Delaware corporation and entered into a contract with it, employing it as their agent to perform the contract with the United States. (No. 7, R. 35-38.)

On December 30, 1933, appellant, David H. Ryan, entered into a contract with the Department of Interior for the excavation of the over-burden at Columbia River Damsite. He began performance of the work under that contract about January 1, 1934 and completed it in the summer of that year. During the entire performance of the work appellant maintained his office and living quarters within the territory of the Grand Coulee Project.

The title to all of the land upon which all of the work was performed by appellant Ryan under that contract had either been acquired by the United States Government by deed prior to the commencement of any work by plaintiff or was being acquired by condemnation proceedings. All of the land on that project upon which appellant's work was done was above the high water mark of the Columbia River and was necessary for and was actually to be used by the United

States Government in the construction of said Project. (No. 8, R. 9.)

On September 1, 1934, appellant, Ryan, entered into a further contract with the Department of the Interior of the United States Government for the construction of a railroad (Spec. No. 572) connecting with the Northern Pacific Railway Company tracks at Odair, Washington and running to the site of the Grand Coulee Dam. The title to all of the lands upon which the construction work under that contract was performed by Ryan, had been acquired for governmental purposes by purchase or condemnation by the United States Government and the entire performance of the contract by Ryan was had upon those lands so acquired. (No. 8, R. 15.)

The lands with which these cases deal consist of

1. Land acquired by the United States through condemnation and conveyance.

2. The river bed or lands below high water mark upon which the foundation for the dam is being constructed.

3. School Lands (occupied by the Government for its own engineers' camp, and traversed by its railroad).

4. Indian tribal lands.

The lands in the first category were acquired with the consent of the State. Those in categories 2 and 3 were acquired by grant from the State of Washington pursuant to Sections 7410, 7411, and 7412 of Remington's Revised Statutes and all these, together with the Indian tribal lands, were set apart by the United States for the use of this project; over all of them, as we contend, the State of Washington has effectively ceded to the United States its full jurisdiction.

SUMMARY OF ARGUMENT.

I.

A. The United States acquired exclusive jurisdiction over so much of the area constituting the Grand Coulee Project as was acquired by it by condemnation or deed.

B. The jurisdiction of the United States was likewise exclusive as to all of the area constituting the Grand Coulee Project that was ceded to it by the State of Washington.

II.

A. On the question of the immunity from State taxation of the gross income received from the United States as compensation for contractual performance, this brief first presents the proposition that the position taken by the Government involves the most sweeping and radical departure from accepted constitutional principle that has been urged upon the Court.

B. No difference in the principle governing bargaining between the government and a private person is perceived, whether the government is seeking to obtain supplies, to negotiate a lease, to secure a loan of money, to obtain services, or to secure performance of a more complicated undertaking. The direct and complete analogy between "a contract for the loan of money" and a contract for future payment of supplies with the contracts in the cases at bar is stressed.

C. Appellants suggest that mere convenience in the administration of the revenue is not sufficient to justify the hazards consequent upon so violent a change in the Constitution or that such a change ought to be by the consent of the people—in other words, by an amendment to the Constitution.

ARGUMENT.

I.

The Exclusive Jurisdiction of the United States.

Inasmuch as it has been established by this Court in *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, and by the Supreme Court of the State of Washington in *Concessions Co.* v. *Morris,* 109 Wash. 46, 186 Pac. 655 (Sup. Ct. Wash. 1919) that a state is without power to tax non-residents engaged in business on lands over which the Federal Government has exclusive jurisdiction, and inasmuch as this proposition is not disputed either by the State of Washington or by the Attorney General of the United States* (Govt. Brief, p. 6), this portion of our brief will be addressed to the contention that the Federal Government has exclusive jurisdiction over the lands on which the Appellants were engaged in the construction of the Grand Coulee Dam.

The area of controversy between the appellants and the Government on this question is greatly narrowed by the Government Brief. Thus the Government concedes that the acquisition of lands by the United States under Article I, Section 8, Clause 17 of the Constitution, with the unqualified consent of the State, "normally" vests in Congress exclusive authority over those lands so purchased. It concedes also that the acquisition of lands under an act passed by the State, ceding to the United States jurisdiction over the lands acquired, gives to the United States exclusive jurisdiction, unless the act of cession by its terms reserves jurisdiction in the State or qualifies the jurisdiction granted to the United States.

The Government and the appellants are at one in claiming that dams erected in navigable streams for the improvement of navigation are "needful Buildings" within the meaning

* For the sake of brevity, the brief submitted by the Attorney General of the United States as *Amicus Curiae* will be referred to herein as the "Government Brief."

of Article I, Section 8, Clause 17 of the Constitution and that a railroad built for the purpose of aiding in such construction is in the same category. They are structures erected for Federal purposes.* It is conceded that within the meaning of the Constitution lands which are taken by process of eminent domain are "lands purchased." It is also conceded that in a "normal" case, i. e., a case in which there is no express Congressional act to the contrary, the acceptance of jurisdiction over lands so purchased or condemned is to be presumed.

But these principles having been agreed upon, the Government goes on to argue that acceptance on the part of the United States is necessary to the vesting of such exclusive jurisdiction, not only where it acquires exclusive jurisdiction over lands by act of cession of the State, but also where it acquires such exclusive jurisdiction by operation of the Constitution; that acceptance or non-acceptance may be deduced merely from the "surrounding circumstances"; and that in the cases at bar acceptance is negatived by certain aspects of the construction contracts entered into between the appellants and the Department of the Interior, acting on behalf of the United States. With this contention, we cannot agree.

In treating this problem, it will be helpful to divide the lands on which the appellants were engaged in the performance of their contracts with the Federal Government into two groups: First, those lands which were acquired by purchase, which comprise the major portion of the area on which the appellants were engaged, and, second, the lands which were acquired by grant through operation of the statutes of Washington (Remington's Revised Statutes, Sections 7410-7412) and the Indian tribal lands.

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* To the case of *United States* v. *Tucker*, 122 Fed. 518, cited and relied on, both by the Government and by the appellants, may be added *Reddall* v. *Bryan*, 14 Md. 444, 74 Am. Dec. 550, appeal dismissed, 24 How. 420.

Cases in support of the other agreed principles are adequately collated in the brief of the Government and the briefs heretofore filed.

The United States Acquired Exclusive Jurisdiction of so Much of the Area Constituting the Grand Coulee Project as Was Acquired by it by Condemnation or Deed

It is established beyond question that where land is purchased by the Federal Government with consent of the State wherein the land is located, exclusive jurisdiction thereover *ipso facto* vests in the Federal Government by operation of Clause 17, Section 8 of Article I of the Federal Constitution.

Mr. Justice STORY, at circuit, was one of the first to recognize that this clause of the Constitution operates to transfer *ipso facto* exclusive jurisdiction from the State to the United States where lands have been acquired by the latter with the consent of the State. In *United States* v. *Cornell,* 25 Fed. Cas. No. 14,867, at page 648, he said:

> "When therefore a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased *by the very terms of the constitution* ipso facto falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted."*

This statement of Mr. Justice STORY was quoted and relied upon by this Court in *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 654. "The question," said the Court, "is not an open one." See also *United States* v. *Unzeuta,* 281 U. S. 138, 142.

The opinions of the Attorney General have followed this doctrine. In 7 Op. A. G. 629, the then acting Attorney General, Honorable Caleb Cushing, spoke as follows:

> "Now, it is thoroughly settled, by numerous adjudications, that all such Federal jurisdiction, as the Constitution contemplates, is acquired by the United States, in the mere consent of the State to the purchase; and that upon such consent, the jurisdiction

* Italics supplied unless otherwise noted.

of the State ceases, and that of Congress comes in by virtue of the Constitution."

This we believe to have been the uniform opinion of judicial tribunals and attorneys general. *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525, 532; 6 Op. A. G. 577.

Consent* to the purchase of these lands by the Federal Government was given by an Act of the Legislature of the State of Washington (Laws 1891, p. 31) (Remington's Revised Statutes, § 8108), as set forth in Appendix A on page 115 of the Government's brief.

In support of its contention that in addition some form of acceptance is essential to the vesting of Federal jurisdiction, the Government turns to the first part of Clause 17, Section 8, of Article I and points to the requirement of express acceptance that applies to lands intended to form the seat of government. The omission of a like provision in the second part of the Clause is said to mean no more than that no express acceptance is necessary where lands are purchased by consent from a state for Federal purposes. The argument, if it proves anything, proves too much. The historic reasons which made it necessary to provide for

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* Appellee, the State of Washington, on page 35 of its brief contends that the State of Washington never consented to the purchase of these lands by the Federal Government, and that therefore the automatic vesting of exclusive jurisdiction thereover did not follow. Counsel support this baseless contention by reference to the Laws of Washington for 1889-90, page 459, wherein it is provided that a description by metes and bounds must be filed as a condition of the State of Washington's consent to the Federal Government's purchasing lands within the State. It is submitted that counsel for the State of Washington are in error in applying this Statute to the lands involved in this case. The Act which they seek to apply has been superseded by that of the following year (Laws of Washington for 1891, p. 31) (Remington's Revised Statutes, § 8108), referring to lands purchased by the Federal Government for dams, etc. Proof of this lies in the fact that the Statute which counsel of the State of Washington seek to apply is no longer printed in the Code of that State, having been replaced by Section 8108. The case of *Pothier* v. *Rodman,* 291 Fed. 318, which counsel cite and quote from to support their contention of the applicability of this Statute is misleading, for in that case an Act was expressly passed by the State of Washington consenting to the purchase of the lands involved. In that Statute there was a specific proviso for the filing of a map as a condition to its consent. Thus while the Statute was similar to that superseded by Section 8108, it in no way proves that the former is still in force.

an acceptance by Congress of lands designed for the seat of the new government are well known. So vital a decision could not be left to the granting states alone. The transfer of jurisdiction over lands contemplated by the second part of the Clause, where the United States itself was to initiate the transaction and the states merely to consent, might well have been considered to be self-executing in character.

Speaking of this consent, Mr. Justice MILLER, in *Ex parte Hebard,* 11 Fed. Cas. No. 6,312, says (p. 1011):

> "The consent of the state being necessary for no other purpose than that of plenary jurisdiction in the Federal Government, it is consent to this which is provided for in the Constitution. This consent may be given whether the land is purchased in the common meaning of that word or not and may be given either before or after title is acquired by the United States. The elements necessary to render valid this consent to the exercise of federal jurisdiction are title in the United States and possession for one of the purposes mentioned in the Constitution."

To these elements the Government's brief would add a third, namely, acceptance on the part of the United States. The brief contains no definition of the action necessary to manifest this acceptance, nor does it state whether the acts of the administrative branch of the government are sufficient alone to manifest acceptance or non-acceptance. We do not understand, however, that the Government challenges the ultimate control of Congress over any acquisition or surrender of public lands or of Federal sovereignty over them. Neither do we understand the Government to press for some sort of acceptance in express words.

It is true that jurisdiction cannot be forced upon the Federal Government nor upon any other sovereign against its will, but where land is acquired under Clause 17, Section 8, Article I of the Constitution, a willingness to assume the jurisdiction which the Constitution contemplates is implicit

in the decision to acquire. The consequences that follow on the purchase are inseparable from the purchase itself.

On the other hand, where there is a cession of jurisdiction over lands or territory by a state as distinct from the consent provided by Clause 17, the state no doubt may qualify its cession in any way not inconsistent with the Federal use. No doubt, also, by analogy to the canons of international law, such an independent cession requires an acceptance by the United States. But even so, as the Government Brief states (p. 80):

> "Generally, of course, jurisdiction over areas acquired for governmental purposes is beneficial to the United States. Acceptance by the United States of a cession therefor may normally be presumed."

In this the Government recognizes, though it would seek to qualify, the principle stated by Mr. Justice FIELD in *Fort Leavenworth R. R. Company* v. *Lowe* (114 U. S. 525, 528):

> "As we have said, there is no evidence before us that any application was made by the United States for this legislation, but, as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part."

Or, as Mr. Justice MILLER phrased it in *Ex parte Hebard*, 11 Fed. Cas. No. 6,312 (p. 1011):

> "It is also urged that some act of Congress assuming this jurisdiction is necessary, even if the statute of Kansas be valid; but I am of opinion that when the locus in quo is under the control of the United States and is used as a fort, magazine or other purpose mentioned in the constitution, the laws of the United States, framed for such places, become the law of these places upon the consent of the state lawfully given for that purpose."

The Government Brief says (p. 83):

> "Normally exclusive jurisdiction may be passed to the United States whether or not there be an express acceptance."

If express acceptance is unnecessary, what is the significant act that gives rise to an implied acceptance? An examination of the authorities cited by us will disclose that in every case it was the ownership or acquisition of land by the United States for the purposes prescribed by the Statute of Cession that accepted the state's offer of jurisdiction and effected its transfer.

Furthermore, the Washington Statute of Cession, no different in this respect from other state Statutes of Cession, manifestly contemplates that the ceded jurisdiction shall pass when the United States acquires or sets apart land for a purpose enumerated therein. The significant portion of that statute reads:

> "* * * the jurisdiction of this State is hereby ceded to the United States of America over all such lands or lands as may * * * be hereafter acquired by purchase or condemnation, or set apart by the general Government for any or either of the purposes before mentioned."

Thus the purchase of private lands or the setting aside of public lands is the indispensable, and the only, act required by the state for the federal government to signify acceptance of its proffer of cession and of exclusive jurisdiction.

The unqualified character of the cession made by the State of Washington should be noted. The Cession Act (Remington's Revised Statutes, § 8108) cedes to the United States "the jurisdiction of this State." The phrase is all-embracing. There is no reservation whatever save in the "sanctuary" clause, which reserves the right to serve civil and criminal process within the lands acquired or set apart by the United States. Yet even this process is only that related to "crimes committed or for any cause of action or suit accruing *without the bounds* of any such tract." The language in which this reservation is couched and its deliberately limited scope are eloquent of an intent on the part of the state to withdraw its power. We submit that there is

no showing whatever of any contrary understanding or attitude on the part of the United States.

The entire theory of the Government on the question of non-acceptance of jurisdiction over the Grand Coulee Dam area seems to be based upon certain portions of the contract made by administrative officers on behalf of the United States with the appellants, or rather upon selected items of the specifications which are annexed to the contract proper and which form a part of it. These specifications the Government Brief seeks to exalt into the dignity of a Congressional Act by reason of the Act of Congress of August 30, 1935 (49 Stat. 1028) which, after authorizing and adopting the Parker Dam and Grand Coulee Dam projects, declares that "all contracts and agreements which have been executed in connection therewith are hereby validated and ratified."* It strains and exaggerates this language to treat a mere blanket ratification of these pre-existing contracts, all and sundry, as a definition by Congress of the territorial jurisdiction it was ready to accept. Jurisdiction is a solemn matter. Rights and liberties, the respective duties of the state and nation, depend upon its accurate delineation. Surely it should not be, surely it was never meant to be left to doubtful inferences from "surrounding circumstances" or the language employed in miscellaneous construction contracts with private citizens.

When we turn to the contract, however, it seems to us that, instead of showing a non-acceptance of exclusive jurisdiction over the lands by the Federal Government, it indi-

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* Doubtless this Act of ratification was intended to comply with Section 9 of the Act of March 3, 1899 (33 U. S. C. § 401) and had no other purpose. See *United States* v. *Arizona*, 295 U. S. 174.

Moreover, if Congress had intended not to have the Federal Government exercise that exclusive jurisdiction, it would have been a simple matter for Congress to have so provided. For example, in each of the following statutes Congress, by specific words, retroceded jurisdiction or some part thereof: Act of June 29, 1936, 49 Stat. 2025, Sec. 1; Section 13(b) of the Act of September 1, 1937, known as "The Housing Act"; Act of March 1, 1911, c. 186, 36 Stat. 963, Sec. 12, 16 U. S. C. Sec. 480 (National Forests) and Act of February 18, 1929, 45 Stat. 1224, 16 U. S. C. Sec. 715g (Migratory Bird Reservations). See, also, 20 Op. A. G. 611, 613.

cates (if it can be taken to speak at all on the subject) a clear recognition of the sovereignty which the United States has assumed. The contract for the construction of the Grand Coulee Dam with Silas Mason, Inc., and others is filed with the Court as Plaintiff's Exhibit A. The specifications on which the bids were submitted and the contract let are included by reference and are also filed, No. 7, Plaintiff's Exhibit B. In these specifications it is definitely provided that the contracting officer (the Federal official in charge) would establish police rules and regulations for all forces employed under the contract, and that if the contractor failed to enforce these rules, the contracting officer might enforce them at the expense of the contractor (Spec. 9); that the contractor was to provide such streets in the camp site as the contracting officer considered necessary for safe and satisfactory use of the public (Spec. 35); that the design and maintenance of the water supply, sewage and sanitation systems were to be subject to the approval of the contracting officer (Spec. 38); that the contracting officer could determine what sort of business should lease space in the contractor's buildings (Spec. 39); that liquor and gambling concessions were forbidden (Spec. 39); that the rates to be charged for meals and lodging were to be prescribed (Spec. 40); that the contractor was to furnish without charge and by arrangement with the state authorities school facilities and instruction, but subject in all respects to the approval of the contracting officer (Spec. 42); and finally that the contractor was required to provide jail facilities and to cooperate in the maintenance of law and order (Spec. 43). All of these things are matters which might have been made the subject of legislation by the Federal Government as sovereign over the territory. They indicate the duties which the Federal Government was prepared to assume.

On page 93 of its brief, the Government, with "no desire to minimize the rather wide scope of these specifications,"

brushes them aside with the comment that each is of temporary duration only and that when the contract is completed these obligations vanish. Conceding this to be true, the same thing may be said for those clauses of the contract on which the Government relies as evidencing the concurrent jurisdiction of the state. When the contract is performed, it is over for all purposes, so far at least as the contractor is concerned. Indeed the contract may end without full performance by reason of the right which the Government retained to terminate it. The compliance with state laws which is exacted from the contractor is no less transitory than his compliance with the regulations imposed by the Federal officials.

The specifications which the Government (Br., p. 94) treats as giving to the State of Washington powers "apparently superior to the control of the Federal Government" are the following: The provision that the contractor must comply with all the laws and regulations of the State of Washington or any agency or subdivision thereof which affect the building, maintenance and operation of the operator's camp (Section 35); that the discharge of sewage into the Columbia River shall conform to the laws and regulations of the Department of Health of the State of Washington; that the contractor shall make arrangements with the state for school facilities and instruction (Spec. 42); and that police protection shall be furnished by the Washington State Patrol in cooperation with the Government (Spec. 43).

Giving to these specifications, for the sake of argument only, that exaggerated importance which the Government ascribes to them, treating them in short as solemn acts of the United States interpreting its own powers, they still seem to be in no way irreconcilable with its exclusive jurisdiction. It is familiar doctrine that upon the transfer of territory by conquest or cession, laws regulating the conduct of individuals remain in force until altered by the newly created

power (*American Insurance Company* v. *Canter*, 1 Pet. 512, 542; *Chicago & Pacific Railway* v. *McGlinn*, 114 U. S. 542). Indeed, insofar as any penal laws of the State of Washington are concerned they are gathered into the Federal jurisprudence and made enforceable by Federal authorities by the express provisions of the Criminal Code (U. S. Code, Title 18, § 468). Doubtless the laws of the state relating to such subjects as the building, maintenance and operation of the contractor's camp, the discharge of sewage, and the disposal of garbage and refuse fall within this category. The entrance into the area by the state and county authorities for purposes of education is solely by reason of arrangements which the contractor is to make subject to the approval of the contracting officer, a Federal official. The services which the Washington State Police are to give in the maintenance of law and order are to be rendered in cooperation with the Government and manifestly by its permission. None of these things evidence any surrender whatever of national sovereignty.

Moreover if these provisions of the contract can be tortured into a withdrawal by the Federal Government of any part of its jurisdiction over the area, which we deny, they cannot be broadened beyond their terms. None of them—nor all of them together— makes of the United States a subordinate sovereign, nor do they invite the entrance of the legislative or taxing power of the state.

But the short answer to the position of the Government in this regard is that the contract and the specifications are conventional agreements between the United States and private contractors. They are not statutes. They are not the result of any negotiations between the United States and the State of Washington. They merely set up standards—standards borrowed in part from the existing laws of the State of Washington, it is true,—to which the conduct of the contractors is required to conform. No penalties other than those attendant upon a breach of contract are

fixed for their disobedience. No power of enforcement is committed to the state. It is wholly specious to regard them as a definition of the power of the nation over the Coulee Dam area. We heartily agree with the Government (Br., p. 96) that "the question of whether or not the United States has accepted exclusive jurisdiction is not to be solved by weighing the respective extent of state and Federal jurisdiction exercised during the construction [sic] of the contract." Exclusive jurisdiction does not flit lightly from one sovereign to another and back again. It requires something more solemn than ephemeral contracts to fix its residence.

Stress is laid upon the fact that trials and convictions have been had within the area by a justice of the peace appointed by a county of the state. If the State of Washington had reserved the power to appoint such officers for service within the Federal area, questions might have arisen which are not present here. It may be that the principle on which Mr. Justice STORY decided the case of *United States* v. *Cornell,* 25 Fed. Cas. No. 14,867 would be broad enough to permit such a reservation without impairing the exclusive jurisdiction invested in the United States. Said Mr. Justice STORY (p. 649):

> "Now there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state that it should permit another state, in such cases, to execute its processes within its limits. And a cession, of exclusive jurisdiction, may well be made with the reservation of a right of this nature, which then operates only as a condition annexed to the cession and as an agreement of the new sovereign to permit its free exercise as *quoad hoc* his own process."

It may well be held that in permitting the state authorities to assist in the maintenance of law and order on land over which it has exclusive jurisdiction, the Federal Government is permitting their acts as *quoad hoc* its own. But it must

not be overlooked that no such condition was annexed to the consent which the State of Washington gave to the vesting of exclusive jurisdiction in the Federal Government. The fact that a justice of the peace appointed by a county of the State of Washington has conducted trials resulting in convictions cannot of itself establish the existence of jurisdiction in the state by which he was appointed. Indeed, if, as we contend, the Federal Government has acquired exclusive jurisdiction over the area, judgments rendered by this justice of the peace were entirely void. (*In re Ladd*, 74 Fed. 31, Circuit Court, District of Nebraska, 1896.)

In summary, it is the position of the appellants that exclusive jurisdiction over the lands acquired by the Federal Government by purchase or condemnation vested in the Federal Government *ipso facto* upon their acquisition with the consent of the state; that no further acts were necessary by either sovereign to effect this result; that any contract entered into thereafter by either with private individuals did not affect the governmental relationship previously established; and that the contract here involved is indicative of recognition by the Federal Government of its exclusive legislative authority rather than any qualification of acceptance on its part.

Finally, the Government Brief (p. 86) expresses some apprehension lest the power of the United States to acquire property "might be more or less seriously curtailed" if it were held that despite the desire or intention of the United States, jurisdiction necessarily passed upon the mere acquisition of property in consenting States. How the legal consequences of acquisition are to lessen the power to acquire, is not easily understandable, unless the suggestion is that the States, dreading the coming of "federal islands" (p. 84) in their midst, may repeal their statutes of consent. But, after all, the States and the nation are not foreign powers vis-a-vis one another. They may arrange matters between themselves as they choose. There can be no question of the

power of the United States to retrocede to the States any exclusive jurisdiction which it may acquire under Clause 17. Unless, indeed, all the land is to be bought once more for Pharaoh, there would seem little more reason to apprehend inconvenience from the operation of that Clause in the future than in the past. The supreme inconvenience would be to leave the question of jurisdiction unsettled by any fixed rule, but deducible only from "surrounding circumstances."

The Jurisdiction of the United States is Similarly Exclusive Over the Lands Title to Which Was Granted by the State as Well as the Indian Tribal Lands.

Turning now to the residue of the area constituting the Grand Coulee Dam Site, it will be recalled that these lands are those lying below the high water mark of the Columbia River, school lands, and the Indian tribal lands. Title to the lands lying below the high water mark of the Columbia River passed to the Federal Government by grant through the operation of Sections 7410, 7411, and 7412 of Remington's Revised Statutes of Washington. We quote the granting clause of Section 7411:

> "The title to the beds and shores of any navigable lake or stream utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works."

It is urged by the Federal Government that this is not a title acquired by purchase within the meaning of Clause 17, Section 8, Article I and that, therefore, exclusive jurisdiction in the United States must follow as the result of legislative cession rather than mere consent. That such a

cession has occurred, however, the Government concedes (Br., p. 104):

> "The United States would, we believe, have exclusive jurisdiction over the river bed. The Washington statute would seem to pass a title sufficient to support a cession of jurisdiction (at least where the land will be permanently used by the United States), even though it is insufficient to constitute a purchase under Clause 17."

As respects the School Lands it is contended that the United States did not acquire exclusive jurisdiction to these lands for the reason that the legislature of the State of Washington, when it granted to the United States the consent of the state to acquire by purchase or condemnation land from individuals or bodies politic within the state, did not intend this consent to apply to a purchase of lands from the state itself. The basis for this contention is found in the case of *State ex rel. Bussell* v. *Callvert* (33 Wash. 380). That case, however, has no relevance to the question here presented. It dealt with a statute giving to the United States a mere use of certain tide lands, which was properly characterized by the Court as a mere easement that terminated under the express words of the statute whenever the use ended. It was decided in December, 1903, two years prior to the passage of Sections 7410, 7411, and 7412 which were enacted in 1905. These sections are widely different in purpose and in scope from the Act involved in the *Callvert* case. They grant the land itself without any defeasance clause whatsoever.

Furthermore, it should not be overlooked that these School Lands were occupied by the United States for its camp of engineers and its railroad. So conclusive was the exclusive jurisdiction of the Federal Government to these lands that the Supreme Court of the State of Washington did not consider them in its opinion.

The record establishes that the Secretary of the Interior,

on behalf of the United States, has duly filed with the state's Commission of Public Lands the notice providing for by Section 7410 and the description of the land required by Section 7412.*

As for the Indian tribal lands, it will be noted that title to these lands was originally in the United States for the benefit of the Indians on the Colville Reservation. (See Executive Order of July 2, 1872.) Title to these lands having always been in the United States, it follows that the property could not have been acquired by purchase under Clause 17. (*Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525). But as to the river bed, School Lands, and the Indian tribal lands alike, all of them are lands "set apart" by the general government for the purposes recited in Section 8108. And over all of them the State of Washington has ceded its jurisdiction by that statute, and the United States has accepted the cession.

II.

Tax Immunity.

With respect to its discussion of tax immunity, the brief of the Government presents a question utterly new. Originally our task was confined to throwing into a strong light the direct and complete analogy between the

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* The Second Report of the Columbia Basin Commission (No. 7, Pltffs.' Exh. E, R. 89) states at page 15:

> "(k) **United States Reserves State Lands and Water for Project.** On January 4, 1934, Mr. T. A. Walters, First Assistant Secretary of the Interior, signed a notice addressed to the Commissioner of Public Lands of the State of Washington, giving notice that the United States intended to make examinations and surveys for the utilization of the waters of the Columbia River and its tributaries in the development of the proposed Columbia Basin project and filed with said notice a list of lands owned by the State of Washington required for the construction of the Grand Coulee high dam. This notice, given pursuant to Sections 7410, 7414, 7412 and 7413 of Remington's Revised Statutes of Washington, was filed immediately thereafter with the Commissioner of Public Lands of the State of Washington, and shortly afterward, in pursuance of the same statutes, a similar notice reserving from appropriation the waters of the Columbia River for the Columbia Basin Project was filed with the Commissioner of Public Lands by the Secretary of the Interior."

cases at bar and the cases expounding the principle of federal immunity from interference by the states. Contrariwise, the sole attempt of the State was to endeavor as best it could to show that our cases displayed some distinguishing mark that kept them beyond the pale. Both sides regarded the decisions of this Court, extending over a century, as controlling the application of the principle.

Differing from the State, the brief of the Government attempts no vain task of distinguishment. Marked no less by disarming candor than ability, it frankly admits that the cases at bar cannot be distinguished from the earlier cases. The bold expedient of drastically curtailing, if not abolishing, the whole doctrine of federal immunity is consequently proposed. This calls for the overruling, not merely of the three cases marked for extinction by the Government Brief, but of the many cases which apply the principle. Counsel of such high standards of frankness and fairness will not deny that as fast as cases identical with earlier cases on the facts come before this Court, the precedents which generations at the bar have considered as the expression of the fundamental law must be set aside. That this will be the gravest and most sweeping departure ever contemplated by any member of this Court, or by responsible counsel, is likewise too plain for argument.

Nevertheless, since counsel of such eminence and official standing propose it, we are constrained to the analysis of this breath-taking proposal. It is true that in late years members of this Court in vigorous dissenting opinions have criticized the extent of the doctrine of federal immunity. A recent example is *Brush* v. *Commissioner of Internal Revenue,* 300 U. S. 352, in which the dissenting opinion suggests that the limitations on the reciprocal powers of the nation and the states to tax be rephrased thus (p. 375):

> "• • • that the exactions of the one must not discriminate against the means and instrumentalities

> of the other, and must not *directly burden* the operations of that other."

The latter half of the rule is further defined in the following language:

> "* * * an exaction * * * infringes the principle of immunity * * * if the burden of the tax be palpable and direct rather than hypothetic and remote."

But the Government Brief asks more than this. Even though the burden of the tax is palpable and direct, still counsel suggest that it be sustained so long as it does not discriminate. The only limitation, then, which is suggested is that such taxes must not discriminate. This is an attack upon a whole body of precedents built up with such painstaking care throughout the years, far wider in scope and necessary consequence than anything ever suggested.

It will be borne in mind that no occasion arises in the cases at bar to examine into the doctrine of reciprocal immunities. We are here concerned only with the unilateral rule that federal activities cannot be taxed by the states. We feel warranted, therefore, in deducing that the criticism of the doctrine of intergovernmental tax immunity is intended to give notice that the entire doctrine as applied by the cases from the beginning is suspect and will be attacked as occasions shall arise.

It is true that the Government Brief contents itself with asking at this time that only *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *U. S.,* 283 U. S. 570; and *Graves* v. *Texas Co.,* 298 U. S. 393, be overruled. But at no point in its brief is the argument of the Government confined to these three cases. It ranges over the whole body of the doctrine of federal immunity, of which these three cases are but a minor part. No means of distinguishing the reasoning of these three cases from the rea-

soning employed in the cases cited in the margin, is suggested.*

Indeed, in very recently seeking to sustain the doctrine of federal immunity in *Graves* v. *Texas Co.*, 298 U. S. 393, the Government in its brief in that case, while then represented by the same counsel as here appear, successfully urged that the *Panhandle Oil* and *Indian Motocycle* cases were a part of the seamless robe of constitutional doctrine that sustained their position. While we do not in the slightest challenge the propriety of such a complete reversal of position as is here exhibited by the Government, wherever it may deem that its interests so require, nevertheless we do say, without fear that the learned counsel for the Government will contend to the contrary, that *all* of the cases here referred to by us, are equally under the condemnation of their argument.

And, since the principal objection to the doctrine of federal immunity as thus attacked by the Government is the introduction of "an extraordinarily large amount * * * of practical contradictions into the body of constitutional law," (Br. p. 17) we are not permitted to suppose that the Government will rest content until all of the cases are overruled that fall under the reproach of the new principle it invokes. Otherwise, by merely overruling the three cases, the Court will succeed only in introducing one more of the "practical contradictions" which have incurred the displeasure of the Government.

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* McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of United States, 9 Wheat. 738; Weston v. Charleston, 2 Pet. 449; People v. Commissioners, 2 Black 620; The Banks v. The Mayor, 7 Wall. 16; Western Union Telegraph Co. v. Texas, 105 U. S. 460; Leloup v. Port of Mobile, 127 U. S. 640; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; Home Savings Bank v. Des Moines, 205 U. S. 503; Williams v. Talladega, 226 U. S. 404; Farmers' & Mechanics Savings Bank v. Minnesota, 232 U. S. 516; Choctaw & Gulf R. R. Co. v. Harrison, 235 U. S. 292; Indian Oil Co. v. Oklahoma, 240 U. S. 522; Gillespie v. Oklahoma, 257 U. S. 501; Jaybird Mining Co. v. Weir, 271 U. S. 609; Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S. 136; National Life Insurance Co. v. United States, 277 U. S. 508; Graysburg Oil Co. v. Texas, 278 U. S. 582; Macallen Co. v. Massachusetts, 279 U. S. 620; Missouri v. Gehner, 281 U. S. 313; Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, and Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466.

Furthermore, it is difficult for us to understand on what logical basis the *Panhandle Oil Co., Indian Motocycle Co.* and the *Texas Co.* cases are selected as the cases, and the only cases here required to be overruled. To our mind, the precedents in fact as well as in principle that are closest to the cases at bar are *McCulloch* v. *Maryland,* 4 Wheat. 316, and *Osborn* v. *Bank of United States,* 9 Wheat. 738, and the immunity from state taxation of federal securities or federal promises to pay as expressed in *Weston* v. *Charleston,* 2 Pet. 449, *The Banks* v. *The Mayor,* 7 Wall. 16, and *Farmers and Mechanics Bank* v. *Minnesota,* 232 U. S. 516.

If there is any distinction, for instance, between a state tax on the promise to pay for goods purchased in *The Banks* v. *The Mayor,* 7 Wall. 16, and the promise of the Government here to pay for goods and services, that distinction assuredly is in favor of the "private persons" here asserting the unconstitutionality of the tax. For in the cases at bar it is the very act of the Government in promising to pay to the contractor, followed by the execution of that promise by the Government, that gives rise immediately to the obligation to pay the questioned tax, based ratably upon the amount of that promise. In the earlier federal security cases the taxes held unconstitutional more remotely attached themselves to the governmental promises made to private owners and purchasers as they passed from one private hand to another.

Indeed, while cases condemning, as an interference with an essential governmental function, the taxation of contracts for the purchase of supplies are illustrations of the principle, they furnish by no means the closest analogy to the cases at bar. By what process of reasoning, unless it be by philosophic subtleties beyond the grasp of mind, can a contract evidencing one form of transaction by which the sovereign supplies its needs in peace or war be distinguished from another? To tax one is as much an interference with the sovereign as to tax another. How does a contract evi-

dencing a transaction by which the sovereign secures money differ from a contract evidencing a transaction by which the sovereign secures anything else needful to its service? Is interference with the governmental activity more or less direct in the case of a government bond, a treasury note, a certificate of indebtedness (in each case merely a contract evidencing a transaction by which the government procures needed money) than in the case of a contract for supplies or services? Finally, how does the promise to pay the debt created by the purchase of supplies differ from the promise to pay the debt created by the purchase of money or credit, and from the promises to pay the debt created in the present cases by the contractors' services?

Discussion of Cases Upon Government Securities.

We discussed in our opening brief many of the cases, such as *McCulloch* v. *Maryland,* 4 Wheat. 316, *Osborn* v. *Bank of United States,* 9 Wheat. 738, and the other cases following them cited in the margin of this brief, *supra* (p. 29). At present we wish to stress the direct and complete analogy between the cases at bar and those founded upon *Weston* v. *Charleston,* 2 Pet. 449, dealing with the immunity from taxation of securities of the national and state governments. An examination of these cases will disclose that this Court has consistently treated a "contract for the loan of money" as not to be distinguished from any other contract essential to the exercise of governmental power.

In *Weston* v. *Charleston,* 2 Pet. 449, it appeared that the United States had borrowed money and the contract to pay it was called "stock." The contract, however, amounted to a promise by the Government to repay the sum borrowed with interest. In the hands of a private individual this so-called stock was taxed by the City of Charleston. Chief Justice MARSHALL, speaking for the Court, said (p. 465):

> "The tax in question is a tax upon the contract subsisting between the government and the individual.

> It bears directly upon that contract, while subsisting and in full force."

Note particularly, if you please, these words:

> "If the States and corporations throughout the Union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract?"

Thus, the Court concludes that the questioned tax, resting nominally on the right of private persons to receive the benefit of the government's contractual promise to pay, is a tax, not on that private person, but, in constitutional effect, on the contract. Consequently, the Court further says (p. 468):

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract."

It is submitted this language shows that the Chief Justice entertained not the slightest doubt that a contract by which the United States obtained a loan of money and agreed to repay it differed in no essential particular from any other contract by which the United States might seek to procure anything essential for national purposes.

What other meaning of the language used "if the States * * * possess the power to tax *a contract for the loan of money,* what shall arrest this principle in its *application to every other contract*" can there be? May we pose a question ourselves, paraphrasing this language: If the states possess the power to tax a contract evidencing one form of government activity, what shall arrest this principle in its application to every other contract, and notably a contract for the loan of money?

We submit that the contract—stock—considered in *Weston* v. *Charleston,* 2 Pet. 449, and the contracts in the cases

at bar differ only in the form of governmental activity of the sovereign.

The Banks v. *The Mayor,* 7 Wall. 16, was decided shortly after the Civil War. The State of New York levied taxes upon the capital stock of The Banks. This capital stock was invested in what were known as "certificates of indebtedness." The origin of these certificates was as follows: During the War the Government obtained supplies and services on credit, promising to pay for them when it could. Thereafter it issued to these creditors certificates of indebtedness for the amount of their claims. May we remark at this point that it will be an ingenious and finely drawn distinction indeed which shall differentiate between the contracts made by the Government during the Civil War and the contracts under consideration in the present cases. That there is no distinction appears from the following language of the Court (p. 25):

> "* * * But we fail to perceive * * * that such certificates issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money."

Counsel argued: "The organs whereby the federal government carries on its operations are, we admit, exempt. But a certificate or statement of a *past indebtedness*—a mere *chose*—property in the hands of a citizen, is not a necessary instrumentality of the government. There is no particular virtue in the certificate. It affords ready proof of the debt but does not alter its character." The Court first examines and quotes the language of Chief Justice MARSHALL in *Weston* v. *Charleston,* 2 Pet. 449, and then remarks (p. 25):

> "* * * It may be admitted that these certificates were issued in payment of supplies and in satisfaction of demands of public creditors. But we fail to per-

ceive either that there is a solid distinction between certificates of indebtedness issued for money borrowed and given to creditors, and certificates of indebtedness issued directly to creditors in payment of their demands; or that such certificates, issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money.

"The principle of exemption is, that the States cannot control the national government within the sphere of its constitutional powers—for there it is supreme—and cannot tax its obligations for payment of money issued for purposes within that range of powers, because such taxation necessarily implies the assertion of the right to exercise such control."

If in 1829 "a contract for the loan of money" is the same as any other contract for the exercise of sovereign power, and if in 1868 a contract which is "a means of executing constitutional powers of the government other than of borrowing money" is "as much beyond control * * * through taxation * * * as bonds * * * issued for loans of money," what has arisen now to distinguish a "contract for a loan" and a contract for the improvement of navigation or a contract for the purchase of necessary supplies? Does the essential nature of things change from day to day?

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, the Court considered the power of the United States to tax the income from municipal bonds issued by the State of New York. It will be observed of this case that the taxing act in question was a net income tax and was levied by the sovereign upon a municipal subdivision of a state. It is clear that a *net income tax* on *income* from "a contract for the loan of money" is far less direct an interference with the power to borrow and offers itself to distinctions of degree and of directness more readily than cases such as at bar. The Court, however, finds that there is no distinction between

the tax in the one case and the tax in the other. It quotes the language which we have quoted from *Weston* v. *Charleston,* 2 Pet. 449, and then remarks (p. 586):

> "Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution."

We submit that a tax levied upon the net income of an individual is a less direct interference with the national government's policy than a gross occupation tax upon the contract itself. Whether this be true or not, the language which we have quoted from the *Pollock* case shows that the rationale of the decision is that a tax in any form upon a contract for the exercise of sovereign power is void because it is an interference with the sovereign power itself. The rationale of the *Pollock* case then applies to the cases at bar. A municipal bond is "a contract for the loan of money" and as such evidences one exercise of sovereign power. Can there be any reason consistent with logic for prohibiting interference with the exercise of one sovereign power and permitting that interference with the exercise of another? We submit that "a contract for the loan of money" evidences an exercise of the power to borrow and that a contract to build a dam in a navigable river evidences the exercise of the power to regulate commerce. Both the power to borrow money and the power to regulate commerce are sovereign powers. Is there any reason why one is more essential to the sovereign than the other?

If distinctions of degree are to control, then the tax in question in this case, bearing as it does directly on the contract itself, is a much more direct and palpable interference with sovereign power than the tax in *Pollock* v. *Farm-*

ers' Loan & Trust Company, 157 U. S. 429, resting as it did only on the net income of the individual which included, among other items, interest from a contract evidencing the exercise of sovereign power.

In the case of *Farmers & Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516, the tax statutes of Minnesota were held by the Supreme Court of that State to authorize the inclusion of certain bonds issued by municipalities in Indian Territory and the territory of Oklahoma in ascertaining the amount of the tax upon the assets of a bank. The tax was held invalid upon the principles laid down in *Weston* v. *Charleston,* 2 Pet. 449, and *McCulloch* v. *Maryland,* 4 Wheat. 316. Again the Court quotes the language of *Weston* v. *Charleston.* The opinion was delivered after an exhaustive review of the cases and the principles involved. At page 526 the Court says:

> "But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them."

Again we find this opinion interesting. The rationale is: that a territory is an instrumentality of the United States government; that a municipality of a territory is likewise an instrumentality of the United States government; that the power of the municipality to borrow money is the exercise of a sovereign power of the United States; that a tax upon a municipal bond of the territory, while in the hands of a private person, is an interference with the exercise of a sovereign power of the United States. Now, it might seem that the inconvenience suffered by the United States by such a tax was not great except in principle. The Court will note that the tax was levied on all alike, resting only incidentally upon the municipal bonds along with other property. The Court will likewise note that the exercise of soverign power is not

by the sovereign directly but by the agent of an agent of the sovereign. And yet this Court finds such a tax is "in the last analysis, to impose a tax upon the right of the municipality to issue them," and deems it entirely clear that such a tax "is a tax upon the operations of the government." Truly, if such a tax interfered with the exercise of sovereign power by the United States, then the tax in the cases at bar levied directly upon a contract for the exercise of sovereign power is an interference with it.

In *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136, a license tax upon insurance companies was measured by the gross income from all sources. The tax was at the rate of 3%. The Supreme Court of Wisconsin sustained a tax upon an insurance company which included in the gross income the interest from United States bonds. The Court remarks that it is not even attempted to be denied that bonds of the United States are beyond the taxing power of the states, and that it is the settled doctrine of this Court that no valid tax can be laid upon the income from such bonds because, "To tax this would amount practically to laying a burden on the exempted principal." The Court then notes the fact that a tax measured by gross receipts amounts to a direct charge, where a tax measured by net income does not. The conclusion follows (p. 141):

> "Here the statute undertook to impose a charge of 3 per cent. upon every dollar of interest received by the Company from United States bonds. So much, in any event, the State took from these very receipts. This amounts, we think, to an imposition upon the bonds themselves and goes beyond the power of the State."

The direct and complete analogy of the tax upon the "contract for the loan of money" examined in this case and the tax upon the contracts in the cases at bar is at once evident. Here, as in that case, the taxing statute undertakes "to impose a charge of .... per cent. upon every dollar • • •

received by the Company * * *." Here, as there, "So much, in any event, the State took from these very receipts." Does not the conclusion follow here that the tax "amounts * * * to an imposition upon" the contracts themselves and "goes beyond the power of the State."

In *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, the Court was called upon to consider the validity of a statute of Massachusetts, imposing an excise tax upon corporations measured as to its amount, partly by the net income which was defined so as to include interest upon United States securities. The tax was held to be invalid as an interference with a constitutional power of the United States upon the principle set forth in *Weston* v. *Charleston*, 2 Pet. 449, which the Court remarks has never been departed from. The following language was used (p. 624):

> "* * * A state tax, however small, upon such securities or interest derived therefrom, interferes or tends to interfere with the constitutional power of the general government to borrow money on the credit of the United States, and constitutes a burden upon the operations of government, and carried far enough would prove destructive. * * *"

The invalidity of the tax depends, then, upon whether it "interferes or tends to interfere with the constitutional power of the general government." In the *Macallen* case the constitutional power of the general government in question was the power to borrow money. In the present case it is the power to regulate commerce. Unless there be some reason in constitutional law which permits the states to interfere with the constitutional power of the general government to regulate commerce, while it does not permit them to interfere with its constitutional power to borrow money, the cases at bar show an example of interference more direct in kind and more burdensome in fact than the *Macallen* case or any of the other cases holding taxation of government securities void.

We will not extend this brief by a discussion of the scores of cases which consider the validity of taxes upon securities issued by the United States or the states. Suffice it to say that there are many more of them which this Court has decided, that the cases in the state appellate courts and in the lower federal courts announcing and applying the principle of the cases we have commented upon in this brief are legion, and that each and all of them depend upon the principle announced in *Weston* v. *Charleston*, 2 Pet. 449.

The Adoption of the Test Proposed by the Government is a Departure From Accepted Principles so Radical That It Amounts to an Amendment of the Constitution.

It will not escape notice that in every case the "contract for the loan of money" is between the government and a private person. In no case does the government borrow from itself or from its agencies. The relation of the government to the private party from whom it borrows, and the relation of the government to the private person from whom it purchases supplies, and the relation of the government to the contractor in the cases at bar differs in no way important in the application of constitutional principles. The test of constitutionality of a tax statute in these cases, as in the cases discussed in our opening brief and cited in the margin, *supra* (p. 29) is the same; namely, whether the interference with a national enterprise is palpable and direct, or remote and consequential.

The test of the validity of a tax upon a national undertaking is not the additional cost to the nation. It is not a question of dollars, more or less. The test is interference with a national enterprise. This is the test applied by this Court in every case, commencing with *McCulloch* v. *Maryland*, 4 Wheat. 315; *Osborn* v. *Bank of United States*, 9 Wheat. 738, and *Weston* v. *Charleston*, 2 Pet. 449, down to *Liggett & Myers Tobacco Co.* v. *United States*, 299 U. S. 383,

and the other cases decided during the present year. By this test the cases are consistent, one with another, and together furnish a practical guide for the taxing authorities, national and local, and for the people in their dealings with the national and local sovereignties. Upon the manifest necessity of such a rule, and upon the precedents showing the application of the rule to particular circumstances, rest a vast number of decisions in the state appellate courts and the lower federal courts. By this principle the framers of the constitutions of the newer states were guided and the legislatures of all of the states have framed their taxing systems in harmony with it.

If for this rule another is to be substituted, it will be necessary to commence at the beginning and through the years rebuild a new system, or else what was harmonious and consistent will become incongruous and impractical. If for the test of interference is substituted the test of amount of cost, or the test of discrimination, or the test of character of persons with whom the sovereign deals, or the test of form in which the taxing interference be cast (regardless of the effect), then what was as clear and easily applied as any rule of law can ever be becomes confusion worse confounded. If in the past any philosophic subtleties or finely drawn distinctions have been indulged in by the courts in applying the rule, the remedy does not lie in establishing a new set of equally subtle and equally conceptualistic applications. The remedy lies rather in refusing to elaborate subtleties of distinction.

However, if for any reason the amount which the national government would be compelled to pay the states or their municipal taxing districts has any relevancy as showing the practical effect of a rule permitting taxation, it is not sufficient to consider the amount and effect of such taxes in times of peace and prosperity alone. The amount and effect of such taxes in times of emergency and stress should be considered. An annual burden on the national government

of ten million dollars may be negligible today. On the other hand, were the nation engaged in a life or death struggle, such as the Civil War, not only would the amount be increased but the burden might well make the difference between survival and destruction.

In the World War every great nation strained its resources to the breaking point—some even beyond that point. Is it beyond a possibility which ought to be considered that the United States may some day be required to expend its every resource for self-preservation? A rule permitting the state, the county, the school district, the port district, the city, and such other municipal taxing subdivisions as are empowered to levy taxes within the same territorial limits, to tax the supply of munitions of war at a time of national emergency would place the very existence of the nation at their discretion. Perhaps this result is not to be apprehended; perhaps there is no need for the national government to have the power to make war or carry out any enterprise in peace. A national government whose powers are much restricted may be better than the government established by the Constitution. Whether better so or not, at least the change is radical.

The principle that a grant of power to the national government excludes interference by the states with the exercise of that power was announced early in our history. It has been repeated time and again—indeed, it has never been seriously questioned. Mr. Justice HOLMES in *Clallam County* v. *United States,* 263 U. S. 341, phrased the proposition thus (p. 344):

> "* * * the prohibition established by *McCulloch* v. *Maryland,* 4 Wheat. 316, was established on the ground that the power to tax assumed by the State was in its nature 'repugnant to the constitutional laws of the Union' and therefore was one that under the Constitution the State could not use. * * * The immunity is derived from the Constitution in the same

sense and upon the same principle that it would be if expressed in so many words."

If at any time since *McCulloch* v. *Maryland,* 4 Wheat. 316, there has been a need for amendment of the Constitution, so as to abrogate this principle, whether in prosperity and peace, in time of civil war or invasion, or in times of panic and depression, an amendment to the Constitution has always been available to furnish a remedy. Today, if there has arisen any need for change, still an amendment to the Constitution is possible.

That so violent a change in the fundamental law ought, if necessary at all, to be with the consent of the people by means of an amendment to the Constitution, is evident. Likewise it is evident that the taxes here considered interfere with an essential activity of the United States government much more directly than the taxes imposed upon the contracts for the purchase of supplies examined in *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; and *Graves* v. *Texas Co.,* 298 U. S. 393, or the taxes imposed upon the contracts for securing money or credit examined in such cases as *Weston* v. *Charleston,* 2 Pet. 449; *The Banks* v. *The Mayor,* 7 Wall. 16; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Farmers & Mechanics Bank* v. *Minnesota,* 232 U. S. 516; *Northwestern Mutual Life Insurance Co.* v. *Wisconsin,* 275 U. S. 136.

This the Government Brief recognizes, for it quite frankly admits that to sustain the present taxes it will be necessary to overrule *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 571; and *Graves* v. *Texas Company,* 298 U. S. 393 (Govt. Br., p. 6) and to criticize the cases declaring that a tax upon the contract (stocks, bonds, notes, certificates, etc.) for the repayment of money borrowed is an interference with an essential governmental power.

Likewise it appears from the brief (Appendix B, p. 121) that 75.4%, or three fourths of all federal construction work begun during 1936 was by contract with private individuals. Obviously some reasons of convenience or economy dictate this policy of the government. Obviously again it will be a direct and palpable interference with the national government if local theories of taxation or local financial necessities are permitted to interfere with this policy.

But if it be admitted—as clearly it must—that gross occupation taxes on construction contracts with the government are more palpable and much more direct interference with the government than a sales tax, then to sustain the present taxes either a complete abandonment of the fundamental principle of non-interference or the drawing of ingenious distinctions where none exist in fact, is necessary. It will not suffice to reexamine and overrule the cases of *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; and *Graves* v. *Texas Co.,* 298 U. S. 393, as they cannot be distinguished from *Weston* v. *Charleston,* 2 Pet. 449; *The Banks* v. *The Mayor,* 7 Wall. 16; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Farmers & Mechanics Bank* v. *Minnesota,* 232 U. S. 516; and *Northwestern Mutual Life Insurance Co.* v. *Wisconsin,* 275 U. S. 136, and the long line of other cases holding it to be an interference with the sovereignty to tax a contract evidencing the exercise of the borrowing power. It will be necessary also to re-examine and overrule the cases of *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *Bank of United States,* 9 Wheat. 738; and the cases founded upon them, discussed in our opening brief. Such a program is one that staggers the imagination.

This Court has established and followed consistently certain distinctions in applying the principle that taxes upon dealings with the sovereign are invalid depending upon whether they interfere or tend to interfere with the exercise of sovereign powers. For instance, it is ruled that inter-

ference occurs only when the tax in substance (as distinguished from words or form) is laid upon the transaction with the sovereign. It is possible that two taxing acts may upon superficial examination appear alike in form because expressed in somewhat similar words. If, however, careful analysis shows them to be different in substance, then their essential nature must govern. This seems simple. There are no philosophic subtleties in this.

The case of *Liggett & Myers Tobacco Co.* v. *United States,* 299 U. S. 383, is an example. A federal tax was levied on the manufacture of tobacco. This tobacco was thereafter sold to the Commonwealth of Massachusetts. The tax was sustained, the Court pointing out that the tax in reality was upon the manufacture, using the following words (p. 386):

> "The tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale. The goods may be disposed of at any price without affecting the amount of the tax; that does not vary. Always the manufacturer must pay 18 cents upon each pound—no more, no less. * * *"

This case is distinguished by the Court from *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, as follows (p. 387):

> "*Indian Motocycle Co.* v. *United States, supra,* much relied upon by petitioner, considered a tax of five per centum of the price obtained upon sale of the article; it rose or fell according to the amount received by the seller."

We fail to perceive any practical contradiction between *Liggett & Myers Tobacco Co.* v. *United States,* 299 U. S. 383, and *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. Perhaps the form of the taxing acts had some outward similarities. However, when examined, in the one case the tax was found to rest upon the transaction with the sovereign because the amount of the tax was measured by the terms of the contract between the private individual and the

sovereign (the sale price), while in the other case the amount of the tax was not measured by or dependent upon the transaction with the sovereign.

An equally simple and clear distinction which has frequently been made the rule of the decision is that a tax upon the property owned by a person dealing with the sovereign does not bear upon the transaction with the sovereign, and consequently does not interfere with it. The sovereign is concerned, when dealing with private parties, only with interference with the transaction, not with other matters. The property and personal rights and obligations of the person with whom the sovereign deals are of no concern to it. It is concerned, however, with the transaction by which it secures that which it desires. If the tax be levied on the property of a private person, the sovereign is in no manner affected. If the tax be levied on the transaction with the sovereign, immediately the sovereign is affected.

The case of *Alward* v. *Johnson,* 282 U. S. 509, and the cases at bar again bear a superficial resemblance, resulting from the words employed in the taxing acts. In *Alward* v. *Johnson,* this Court upheld a California tax on the equipment of bus lines, measured by gross receipts. But mark the distinction. The Supreme Court of California had repeatedly held the tax to be a property tax levied in lieu of a tax on the property of the line, and not to be an excise tax on the privilege of carrying the mails for the United States government. The tax under consideration in the cases at bar is thus described by the Supreme Court of the State of Washington in *State* v. *Yelle,* 174 Wash. 402, 406, 407:

> "* * * we are well satisfied that this is not a property tax, even under the broad and all inclusive terms of our constitution. * * *
>
> "This act does not concern itself with income which has been acquired, but only with the privilege

of acquiring, and that the amount of the tax is measured by the amount of the income in no way affects the purpose of the act or the principle involved."

The Supreme Court of the State of Washington in its decision in the present case, while holding that the tax had for its purpose, revenue, notes that it is an excise and not a property tax (No. 7, R. 57). The Court will note that it stands admitted that the tax in question here is not in lieu of property taxes but is in addition thereto. It scarcely needs remark that a decision upholding a tax upon the property of a private party having dealings with the sovereign has no relevance in considering an excise tax upon the privilege of carrying on dealings with the sovereign. So long as the nature of things differs, there must be distinctions in the law or it ceases to reflect actualities.

Discrimination as a Test of Validity.

We do not deny that this Court can detect and destroy any discrimination against the national government which may in fact appear in a taxing ~~act~~, regardless of form or disguise. National and state legislative bodies have before this attempted to accomplish what is forbidden under guise of what is permissible. Such attempts have been detected if not with ease, at least with ultimate success. On the other hand, why is it reasonable to suppose that an intent to discriminate against federal activities, or an actual discrimination without such intent, can be more easily detected and prevented than interference with federal activities? The attempt to define and apply to varying circumstances the generality "discrimination" is not less of a task than the attempt to define and apply "interference." Will not the shadowy line of what is or is not discrimination be as difficult to see with precision or to define with perfect clarity as any other general idea? Or is it to be supposed that legis-

lators will be less astute in masking discrimination under some form which is "fair to see."

The answer lies in the cases commented on in the Government Brief, pages 30-32. We are not willing to admit that the presence or absence of discrimination had aught to do with the deciding of these cases. If in argument this ground was urged as a test of validity, or invalidity, we think the very fact that the decision is based on other grounds shows that the test was rejected. But will the Court note how cunningly the discrimination was disguised in the cases, as stated by the Government Brief. And was the detection easy or did all members of the court agree either that it was present in fact or upon the formula for detecting its presence? In short, is it not clear, all other considerations apart, that discrimination will be a less satisfactory test because of the very difficulty of determining what amount of discrimination is permissible and when it is present or absent, in fact or in intent?

For example, in Note 11, page 30 of the Government Brief it is stated:

> "The exaction there was applicable only to branches of banks not chartered by Maryland (4 Wheat. 316, 320-322). It was asserted by Pinckney in his argument that the Bank of United States was the only such bank operating in the State (4 Wheat. at 392) and this apparently was not challenged by opposing counsel or doubted by the Court."

We would suppose that the states might classify foreign corporations as a distinct class for taxation purposes without showing an intent to discriminate against the United States. Again, would the mere fact that the Bank of United States happened at a particular moment to be the only bank which brought itself within the general class, show discrimination, either in intent or in fact? Is not Pinckney's argument, at page 392 of the report, the weakest and least convincing part? And does not the opinion of the Court,

placing the decision on other grounds, show that the Court believed that discrimination as a test was unsound and unsafe?

The Mwak Company.

We are surprised that the government should think it worth while to quibble over whether the corporation organized by the contractors, wholly owned by them, and officered and directed by their officers, is or is not their agent. Suffice it to say that the amended complaint (No. 7, R. 6, 7) pleads these facts and pleads that the contract is being performed by the contractors through this corporation as their agent. This allegation was admitted. The Attorney General of the State of Washington made no question concerning the matter in the trial court, nor on appeal to the State Supreme Court, nor on the appeal to this Court. None of the courts before whom this case has been argued has apparently considered the matter of the slightest importance since it has never before even been mentioned. The contract with the government of the United States has not been sublet, assigned or transferred in any manner. The parties who signed that contract remain responsible for its performance to the United States. To them is paid the agreed compensation, a part of which the State assumes to take under the guise of a tax. We should suppose that interference with the government's business, or the reverse, was the vital question at issue in this case, not the question of what agents, employees, means or methods the contractors choose to carry out their agreement.

Appendix B of Government Brief.

Perhaps a word of comment on Appendix B of the Government Brief is in order. This Appendix is in the nature of a factual or economic study, directed to the volume of taxation which might be realized from contractors and vendors dealing with the Federal or State Governments

respectively. We think its estimates in no way a helpful contribution.

It is prefaced by the candid statement that:

> "It is wholly impossible to make a tolerably satisfactory estimate of the savings which the Federal Government derives from the doctrine that its contractors and vendors are immune from gross receipts and sales taxes. * * * Even if a precisely accurate estimate could be made, and a figure be reached as to the comparative savings realized under existing legislation, the result would have only a transitory significance. None can predict the future tax structures either of the states or of the nation."

With this statement it is impossible to disagree. It demonstrates the irrelevance to a discussion of the underlying principle of any current statistics on the subject.

It occasions surprise, therefore, to read on turning the page that counsel for the Government feel it necessary to undertake the task which they have conceded to be impossible. They preface this attempt with the remark (Govt. Br., p. 120):

> "However, we have assumed that any estimate, however unsatisfactory, is better than none."

Why this should be true we are at some loss to understand. Unless, indeed, lights along the shore, no matter how false, are better for the mariner than steering by the stars.

We do not feel it necessary to criticize in detail the manner in which the remainder of this Appendix is built up. But when it is interspersed with such statements as:

> "We again repeat that the margin of error in this estimate is probably several hundred per cent" (p. 128);

or

> "We again emphasize that this figure is so rough that it cannot be thought to be even approximately correct" (p. 129),

it would seem to be clear that the statistical estimates in the Appendix do not serve even "for the purposes of an illustrative guess."

It is suggested that the admitted additional burden upon the national government arising from taxation by the states and their municipalities, and hence the additional taxation of the people of the whole nation, will "be offset by Federal taxes upon those who deal with the States; and none can tell whether under future tax structures the balance will lie with the central government or with the States" (Govt. Br., p. 3). In short, the result of reciprocal taxation, national and local, will be the same as reciprocal exemption from taxation.

This leaves out of account the cost of tax collection. The machinery by which taxes are levied and collected is both cumbersome and expensive. Only a fraction of the total amount levied as taxes ever reaches the national or local treasuries. The difference is the cost of the levy and collection. Thus, if local and national reciprocal impositions exactly balance, the national and local treasuries receive the same amounts, but what of the people? While the treasuries have received the same amounts, the people who pay the national and local taxes have suffered by the additional burden of the cost of levy and collection of the additional taxes. The tax gatherer multiplies and flourishes. The legions of the Internal Revenue Department increase. The local assessors, examiners and collectors grow in number.

This is the result, if the reciprocal exactions exactly balance. But the writer of the Government Brief candidly admits that it is impossible to guess which side would get in ahead in the race to see who could impose the heavier burden. Our own impression is that the reciprocal exactions would vastly increase but would never balance. First one side would increase its taxes on the other, and then the other would increase its taxes on the first. Since either the local or the national treasury would suffer if the exactions did not

balance and the people of the one government or the other would have their funds diverted from the purpose for which they were appropriated, we fancy that the taxpayer in the end would bear the burden of the suggested beautiful, simple and easy (for the tax collector) system.

We submit that the Grand Coulee Project is a national enterprise undertaken by the national government for the benefit of the people of the nation as a whole, and that it is paid for by the national money obtained through taxation upon the people of the nation. By what right do the residents within a single state seize as their own exclusive property, and divert to their own exclusive ends, money of the people of the nation collected by the national government upon trust to be used for national purposes? In medieval times, the barons who had seized and maintained strongholds along trade routes demanded tribute from the merchants who were obliged to travel there to reach their trading posts. Can it be seriously urged that the national and state governments shall lie in wait, one for the other, because, forsooth, the exactions of one theoretically can be made to balance the exactions of the other, provided that the expensive legion of tax gatherers, like the expensive panoply of iron-clad mercenaries, be left out of account?

Conclusion.

A major portion of the land on which all contracts pertaining to the Grand Coulee Project are performed were acquired by the United States through purchase, that is, condemnation and conveyance, with the consent of the State of Washington. The balance of the territory was acquired by cession from the State of Washington.

The dam is a needful building and, therefore, within the purview of Clause 17 of Section 8, Article I of the Constitution of the United States. Thus, exclusive jurisdiction has been vested *ipso facto* in the United States Government and

no further acts on the part of either the Federal or State Government were necessary.

The acquisition of the lands comprising the territory through purchase and cession, and the exclusive jurisdiction thereover transferred to the United States by the State of Washington had the full consent of Congress through its act of ratification of the Grand Coulee and Parker contracts. The only reservation that was permitted to the State of Washington is that which is embodied in Section 8108, that is, the right to serve process for any cause, civil or criminal, within the area for actions arising outside the area acquired.

Hence, the State of Washington, upon this branch of the case, was completely without power to impose any tax upon the gross income received by appellants under their contracts with the United States for the construction of the Grand Coulee Dam.

The immunity of the appellants from taxation by the State of Washington upon the gross income received under their contracts with the United States is that which has been afforded since *McCulloch* v. *Maryland*. It does not depend at all upon the doctrine of reciprocal immunity. To permit the tax upon the appellants in the instant cases would amount to an amendment of the Constitution of the United States, without action by the people. Neither policy nor logic justifies any infringement upon this well-conceived and well-founded principle of sovereignty of the Federal Government.

It is submitted that the judgments of the Supreme Court of the State of Washington in these causes should be reversed and judgment rendered in favor of appellants.

Respectfully submitted,

JOHN W. DAVIS
B. H. KIZER
J. ARTHUR LEVE
E. D. WELLER
Counsel for Appellants

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 8

DAVID H. RYAN, *Appellant*,

vs.

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DAVID H. RYAN, *Appellant*,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellees.

Office and Postoffice Address: Temple of Justice, Olympia, Washington

STATE PRINTING PLANT, OLYMPIA, WASH.

IN THE

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OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 774

DAVID H. RYAN, *Appellant,*

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THE STATE OF WASHINGTON, *Appellee.*

DAVID H. RYAN, *Appellant,*

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BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellees.

Office and Postoffice Address: Temple of Justice, Olympia, Washington

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IN THE

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OCTOBER, 1936, TERM

No. 774

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DAVID H. RYAN, *Appellant*,

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TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, Constituting the Tax Commission of the State of Washington, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

STATEMENT OF THE CASE

Appellant claiming immunity from the occupational tax of the State of Washington contained in chapter 191, Laws of 1933, as amended by chapter 57, Laws of Washington, Ex. Sess. of 1933, has appealed from a denial of this immunity by the

supreme court of the state in two cases here consolidated for argument.

The first of these cases is an appeal from an order of the Tax Commission of the State of Washington, holding appellant to be taxable with respect to his contracting business, under the general provisions of chapter 57, Laws of Washington, enacted at the Extraordinary Session of 1933, and with respect to his mercantile business as a retail merchant under section VII, subsection (d) of chapter 191, Laws of 1933, page 873. The trial court sustained the order of the tax commission and the supreme court sustained the judgment of the trial court.

The second case was filed to restrain the collection of the same occupational tax from appellant with respect to his contracting business, in the construction of a railroad 30 miles in length from the city of Odair, Washington, to the site of the Coulee project.

In neither case does appellant claim to be a governmental instrumentality nor seek exemption as an agent of the Federal government. Unlike the contractors in the case of *Silas Mason Co., Inc. v. State Tax Commission*, No. 773, October Term, 1936, in this court, appellant admits that he is an independent contractor not entitled to the immunity from state taxation enjoyed by the Federal government, and relies solely on the claim that both his

contracting and mercantile businesses were conducted entirely outside of the State of Washington.

The history of the Coulee Dam project is given in appellee's brief in Cause No. 773, which will be argued with this case and this will not be repeated.

It must be borne in mind, however, that this project was started as a state project for the irrigation and reclamation of arid lands, and the production of power, and that the Federal government allocated relief monies to the project under the N.I.R.A. without specific act of Congress until long after appellant's contract had been performed and that there has been no effort on the part of the Federal government to establish any reservation.

ARGUMENT

Appellant contends that the lands acquired for the Coulee Dam project were acquired by purchase for one of the purposes within article 1, section 8, clause 17 of the Federal Constitution, with the consent of the state and that, therefore, Federal jurisdiction is exclusive in such area for all purposes.

In the event the court should find that the Coulee Dam project does not constitute "other needful buildings" within the provisions of article 1, section 8, clause 17 of the Federal Constitution, counsel for appellant argues that the United States still is a purchaser of the land with the consent of the state and that the state has ceded its jurisdiction so that in any event the property being used for the Coulee Dam project is outside of the State of Washingon and no state tax can therefore be valid in that area.

These arguments are advanced without a close examination of the facts as applied to the statutes of Washington and the cases construing them, an examination of which will show that the Federal government is simply exercising concurrent jurisdiction with the State of Washington and has required that appellant submit to the jurisdiction of the State of Washington.

APPELLANT'S FIRST CONTRACT WAS PERFORMED OUTSIDE OF COULEE DAM AREA

Appellant performed the first contract by subletting the same from his office, which he maintained in the Davenport hotel in the city of Spokane, Washington, which is, of course, outside of the Coulee Dam area. (R. 11.) He was subject to the jurisdiction of the courts of this state and indeed was sued in respect to the performance of this identical contract in the superior court of Spokane county.

The case was appealed to the supreme court and the decision will be found reported in 183 Wash., at page 590. Appellant's opening brief in that case was prepared by counsel who now represent him in the instant cases, and contains the following excellent statement of the manner in which appellant conducted his contracting business:

"* * * Appellant was the lowest bidder for this work, and the contract was thereafter let to him. The work consisted of moving one million cubic yards of overburden on each side of the Columbia river from the respective ends of the proposed dam, being a necessary preliminary to the actual construction work. The work was performed by excavating the overburden with power shovels and hauling it with dump trucks to the designated spoil banks or dumping places, about twenty-five hundred feet up river from the damsite. *The work was all performed by appellant through subcontractors;* the west side, called in the contract schedule No. 1, being let to Goodfellow Brothers, a corporation; while on the east side, called schedule No.

2, the excavation, generally referred to as the lefting or loading, was contracting to M. S. Ross, and the hauling contract was let to McCutchen Transportation Company. There was also one other small subcontract on the east side, which has no bearing on this case and which will not be further referred to." (Italics ours.)

If we concede for the sake of argument that the Coulee Dam area was under the exclusive jurisdiction of the Federal government, still appellant would have been taxable inasmuch as he transacted some business on an area of the state outside of the Federal reservation.

Ohio River Contracting Co. vs. Gordon, 244 U. S. 68;

Sollitt & Sons Construction Company vs. Commonwealth (Va.), 172 S. E. 290.

But it cannot be conceded that there is any Federal reservation over which the Federal government could have exclusive jurisdiction and it is submitted that the contractors are taxable with respect to both their contracting business and their mercantile business.

APPELLANT'S CLAIM OF IMMUNITY FROM STATE TAXATION NOT SUPPORTED BY THE FEDERAL GOVERNMENT

As pointed out by the supreme court of the state, this is not a question between the Federal government and the state as to jurisdiction. Both governments are actually exercising concurrent jurisdiction.

Appellants attempt to avoid the payment of taxes to the State of Washington which are imposed upon all engaged in the contracting business and for this purpose alone argue that the Coulee Dam area, of whatever size it may be, is outside of the State of Washington.

Appellant's contract does not authorize it to represent the Federal government in seeking immunity from state taxation. As this court said in *State v. Wiles*, 116 Wash. 387, at page 392, under these circumstances, it must be presumed that it was the intention that the contractor should be governed by the laws of the state.

In the case at bar, however, the Federal government has specifically provided that the contractor shall be subject to the jurisdiction of the state.

Appellant is afforded protection in his civil affairs by the State of Washington alone. His attempt is to enjoy the protection which the state affords those doing business within its borders without assuming the obligation of paying for that protection.

Were this attempt to succeed, the many residents of the area adjacent to Coulee Dam would be disenfranchised and both the state and Federal governments seriously embarrassed.

We approach the question from the standpoint of both governments that relinquishment of the power to tax is never to be assumed (*Trimble v. Seattle*, 64 Wash. 102); that tax exemptions are not to be extended by judicial construction (*Thurston County v. Sisters of Charity*, 14 Wash. 264), and that when the Federal government acts under the authority of the commerce clause for improvement of navigation, it does not divest the state of exclusive jurisdiction and its sovereign power over lands used in connection with such improvements.

THE FEDERAL GOVERNMENT DOES NOT ACQUIRE EXCLUSIVE JURISDICTION OVER LANDS USED IN PROJECTS FOR THE AID OF NAVIGATION

While the project in the case at bar was first granted relief monies by the Federal government to aid unemployment and while it is primarily an irrigation or power project, counsel for appellant seem to feel that their case stands on a better footing if the project is treated as one in aid of navigation solely.

While this is ordinarily a Federal function, Congress may consent to the improvement of navigation by the state and a contribution in aid of the project is sufficient consent.

Huse vs. Glover, 119 U. S. 543;
Harmon vs. Chicago, 147 U. S. at 409.

The dam itself rests upon the bed and shores of a navigable river in the State of Washington and

title to the land underlying the said river is, of course, in the State of Washington in trust for public uses.

The supreme court of the state of Oregon pointed this out very clearly on rehearing the case of *Atkinson vs. State Tax Commission of Oregon;* in an opinion handed down April 6, 1937, and reported in the Oregon Advance Sheets, volume 24 at page 535.

The supreme court of Oregon in that case held that the contractors constructing the Bonneville dam across the Columbia river under contract with the War Department as an aid to navigation, were subject to be taxed by the state of Oregon and repulsed the argument that the area was under the exclusive jurisdiction of the Federal government.

In the Oregon case, as in the case at bar, a general statute of consent and cession of jurisdiction was relied upon by the contractors. Inasmuch as this opinion may not be readily available, the following rather lengthy quotation from the majority opinion may be helpful:

"Both channels of the Columbia river within the Bonneville dam project are navigable waters. And since they are navigable, the soil underneath them below ordinary high-water mark within the territorial limits of the state of Oregon belongs to this state: *State v. Imlah*, 135 Or. 66 (294 P. 1046); *Cook v. Dabney*, 70 Or. 529 (139 P. 721); *United States v. Utah*, 283 U. S. 64 (75 L. Ed. 844, 51 Ct. 438); *Pollard's Lesse v. Hagan*, 3 How. 212

(11 L. Ed. 565); *Shivley v. Bowlby*, 152 U. S. 1 (38 L. Ed. 331, 14 S. Ct. 548).

"The title to lands under the water of these channels within the territorial limits of the state of Oregon has not been acquired by the federal government from the state of Oregon by purchase, condemnation or otherwise. Nor has the state of Oregon ceded to the national government exclusive legislative jurisdiction over the waters of these channels.

"In *United States v. Bevans*, 3 Wheat. 336 (4 L. Ed. 404), a question arose as to whether the state of Massachusetts or the United States had jurisdiction over a crime committed on a warship "lying at anchor, in the main channel of Boston harbor." In his opinion therein, at page 385, Chief Justice Marshall said:

'What then is the extent of jurisdiction which the state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States.'

* * * * * *

"In *Middleton v. La Compagnie General Transatlantique*, 100 Fed. 866, the circuit court of appeals for the second circuit had before it the question of whether an administrator could maintain an action for damages sustained by the widow and next of kin in the case of a death due to negligence at a place in the harbor within three-fourths of a mile of Sandy Hook. The court, after pointing out that there could be no recovery in a court of admiralty under the general martime law for loss of life, stated that it must be shown that the accident happened at a place within the legislative jurisdiction

of some state whose law permits such recovery. The court predicted its conclusion in the case on the assumption, as contended for by the plaintiff, that the United States purchased "the island or cape of Sandy Hook from shore to shore, bounded on all other sides (than the south) by the sea and Sandy Hook bay.

"It was there held, however, that in purchasing this property the United States did not obtain any land below low-water mark. The court said:

'The purchase, if there was a purchase, and the act of concession, if it be susceptible of a construction which will bring it into harmony with the constitution, and thus make it a valid "Consent to the purchase," gave to the United States the right to exercise exclusive legislative jurisdiction only in so much of the state of New Jersey as was to be transferred. Over all other places within the limits of that state her legislative power remains as full and complete as it was before, except that it must be so exercised as not to destroy or impair the forts, arsenals, and other structures erected on the land transferred to the federal government for military or public purposes. The accident happened, as we have seen, upon inland waters which were within the limits of the state (conceded to be so by the neighboring state and by the United States) before the act of cession; and, since that act does not purport to transfer the locality in question, the public laws of New Jersey are in full force there, and were so at the time of the accident.'

"The above case was cited with approval by the supreme court of the United States in *Hamburg-American Steamship Co. v. Grube*, 196 U. S. 407, 415 (49 L. Ed. 529, 25 S. Ct. 352), in the following language:

'Moreover, as was held by the circuit court of appeals for the second circuit, in *Middleton v. La Compaignie Generale Transatlantique*, 100 Fed.

Rep. 866, the act did not purport to transfer jurisdiction over the littoral waters beyond low water mark, and for the purposes of this case the public laws of New Jersey must be regarded as obtaining there, whether enacted prior or subsequent to the cession.'

"In the case of *Bigelow v. Nickerson*, 70 Fed. 113, the circuit court of appeals, seventh circuit, had before it the question of whether a statute of Wisconsin giving the right of recovery for death from injury applied to a death which occurred on the waters of Lake Michigan. It was contended that the law was in conflict with the provisions of the constitution of the United States granting to Congress the power to exclusive legislation in all cases of admiralty and maritime jurisdiction. In holding that the Wisconsin act was not violative of this constitutional provision the court said:

'In the case of *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, and in the case of *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, it is said to be the settled law of this country that "ownership of, and dominion and sovereignty over, lands covered by tide waters or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be without substantial impairment of the interest of the public in such waters, and subject to the paramount rights of Congress to control their navigation, so far as may be necessary for the regulation of commerce." In the latter case it is said (page 58, 152 U. S., and page 548, 14 Sup. Ct.) that, upon admission of states into the Union, the "administration and disposition of the sovereign rights in navigable waters, and in the soil under them," passed to the control of the states within whose boundaries such waters were included. See, also, *Mann v. Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820.

'The grant to the United States, in the constitution, of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over them. *Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and martime jurisdiction granted to the government of the Union, but the general jurisdiction over the place, subject to this grant, adheres to the territory, as a portion of territory not yet given away, and the residuary power of legislation will still remain in the state. U. S. v. Bevans*, 3 Wheat. 336. We are therefore of the opinion that the surrounding states, within the limits prescribed in their respective organic acts, have sovereign rights in and over the navigable waters of Lake Michigan, subject to the paramount right of the federal government to regulate navigation and commerce between the states and with foreign nations. *The right of the state to legislate and to enforce its laws is plenary, within the boundaries prescribed, limited and controlled only by the paramount laws of the nation. There does not necessarily result any conflict. Both jurisdictions can coexist in the same plane in complete harmony.*' (Italics supplied.)

"After discussing further the jurisdiction of courts of admiralty, the opinion thus continues:

'We think the clear result of the authorities to be that the sovereignty of the state of Wisconsin extends to the middle of the lake, and that its laws, so far as they do not conflict with the laws of the United States passed in the regulation of commerce and of navigation, are operative within its prescribed boundary.'

"*Stockton v. Baltimore & N. Y. R.*, 32 Fed. 9, was an action brought on behalf of the state of New Jersey in the name of its attorney general. A question there arose as to the right of the Staten Island Rapid Transit Railroad Company, under permis-

sion granted by Congress to said company and the named defendant, or either of them, to erect a bridge 'across Arthur kill, between New Jersey and Staten island, in the state of New York, upon the lands of the state (of New Jersey) situate on the shore, and under the waters of said kill,' to proceed with the construction of such bridge without the consent of the state of New Jersey and without compensating that state for taking the bed of the stream on which the bridge supports were to be placed. The opinion in the case was written by Justice Bradley, a member of the United States supreme court sitting as a circuit judge.

* * * * * *

"It was also urged by the petitioner therein that the state could be ousted by the federal government of exclusive jurisdiction over the area included in the bridge project only by purchase of the land by the government with the consent of the state or by cession by the state of jurisdiction over the same. The court answered this argument by saying that the state itself can not by refusing to give its consent prevent the federal government from carrying out its constitutional functions. In further answer to the above contention, after referring to the provisions of the federal constitution hereinabove quoted, the court observed:

'It is argued that this is the only constitutional method by which the United States government can obtain the possession and use of lands within a state, especially of lands belonging to the state.

'The argument, however, is directed to the acquisition of territory, with exclusive jurisdiction over the same, and is entirely sound in that regard. But it does not touch the question as to the power of the United States to acquire the mere use of the land without exclusive jurisdiction therein. Nearly all the powers of government are exercised over territory in which the United States and the several

states have concurrent jurisdiction. *It is only in exceptional cases that the United States desires to have exclusive jurisdiction, and a consequent cession of territory.* It is very true that the consent of the state legislature is required in order to give the United States this exclusive jurisdiction. But that is all. It is not required when exclusive jurisdiction is not sought. On the contrary, the government, if it sees fit, may condemn land for its purposes without the consent of the state. Thus it was decided by the supreme court in the case of *Kohl v. U. S.*, 91 U. S. 367, that the government of the United States may exercise the right of eminent domain within a state, for the purpose of condemning land for the use of a post-office building, and may, for this purpose, resort to its own courts. In such a case, there can not be a doubt that the post-office building could be erected and used by the government without asking the consent of the state legislature. Such consent would, indeed, be necessary to vest in the United States exclusive jurisdiction over the post-office building and grounds; but it would not be necessary to enable the government to use the property for the purpose for which it was acquired. *And so of any other property wanted for a public purpose; the consent of the legislature is not necessary to its acquisition, or to its use; but only to the exclusion of state jurisdiction over the place.* That jurisdiction, if allowed to remain, will extend to the punishment of crimes committed against state laws therein, and to the service of state process, but, of course, can not interfere with the execution of the United States laws, nor with the performance, by United States officers and agents, of the duties devolved upon them.' (Italics supplied.)

"In *United States v. Utah, supra*, the court said:

'The government also refers to proceedings since Utah became a state, with respect to governmental

investigations, operations under placer claims, and withdrawals for power and reservoir sites. It is not necessary to review these transactions in detail, as nothing that has been done alters the essential facts with respect to the navigability of the streams, and the United States could not without the consent of Utah, divest that state of title to the beds of the rivers which the state had acquired. Nor has Utah taken any action which could be deemed to estop the state from asserting title.

* * * * * * *

"No authority has been called to our attention to the effect that the state of Oregon has in any way relinquished its sovereignty over the area occupied by the waters of Bradford slough and that part of the north channel of the Columbia river which is within the territorial limits of the state. The whole contention of the plaintiffs seems to be based upon the well recognized rule that the federal government has exclusive power to regulate commerce, and that such power extends to control of navigable waters of the country, to the lands beneath them, and to the erection of bridges, piers and all other instrumentalities of commerce which in the judgment of Congress may be necessary or expedient for the exercise of this power. *Such paramount authority, however, does not give to the federal government exclusive jurisdiction except in matters relating to the regulation of commerce and navigation, and the state is free to exercise exclusive legislative jurisdiction in all other matters within its territorial boundaries, except in such instances as it has in some manner relinquished jurisdiction.* (Italics ours.)

"It is therefore apparent that the state of Oregon has power to tax any personal property belonging to private individuals located on any of the navigable waters within the Bonneville dam project inside the exterior boundaries of the state. Like-

wise, any other power of taxation which the state has would be effective within that area.

"The plaintiffs place much reliance upon the case of *United States v. Tucker*, 122 Fed. 518, in which it was held by the United States district court that a dam was a 'needful building' within the meaning of the provision of the national constitution hereinabove quoted. The question there involved was raised by demurrer to an indictment which charged the defendant with a crime committed on lands owned by the United States and known as lock No. 3 on Green river in the state of Kentucky. The court pointed out that the place where the criminal acts were alleged to have been committed 'was on land then used for public purposes; that the state's interest in the land had been ceded to the United States by the legislature of Kentucky under an act approved February 20, 1886 (1 Sess. Acts 1885-1886, p. 11, c. 69); and that in addition to this legislature of the state had, by the same enactment, in express terms, yielded to the United States jurisdiction over it.' No such consent was given in the instant case or cession made by the state of Oregon of jurisdiction over the navigable waters involved in this litigation.

"*Most of the foregoing discussion has been limited to the area not purchased by the federal government. In that area, however, the main structural part of the works is to be located. Even assuming that the construction in the Bonneville dam project may be classified as a 'needful building,' nevertheless only a small part of it is located on lands purchased by the federal government.* (Italics ours.)

"To erect and maintain a structure such as the Bonneville dam, the declared purpose of which is to develop hydro-electric power and to aid navigation, does not necessitate the United States government's having exclusive jurisdiction over the site of con-

struction. Such a project differs materially from 'forts, magazines, arsenals' and similar structures, which by their very nature demand that the federal government have exclusive jurisdiction over them.

"It has already been pointed out that the federal government may acquire by purchase, condemnation or otherwise, lands within the state, without the consent of the state, for governmental purposes, and that in many instances the federal government does not desire to exercise exclusive jurisdiction over the land so acquired. The mere fact that there may be on the statute books of the state a general law, such as sec. 601303, Oregon Code 1930, consenting to the purchase of land by the United States and granting to the national government the right to exercise exclusive jurisdiction thereover, does not imply that over all lands purchased by the national government in the state after the enactment of such law the state is divested *ipso facto* of sovereignty, and exclusive control over the acquired area is assumed by the federal government. *In the instant case there is nothing to indicate that the federal government desires to exercise exclusive legislative jurisdiction over the land purchased by it within the Bonneville project. It would be somewhat inconsistent to assume that since it does not have such jurisdiction over the major part of the structures which are now being built, the federal government is seeking to exercise exclusive jurisdiction over that part of the works located on lands title to which it has acquired.* (Italics ours.)

* * * * * *

"We conclude that the federal government has not acquired, nor is it assuming, exclusive legislative jurisdiction over any of the area within the Bonneville project inside the territorial limits of the state of Oregon, and that the plaintiffs are amenable to the laws of this state relative to taxation on personal income earned within the state."

The following quotation from the opinion of Mr. Justice Bradley in *Stockton vs. Baltimore Railroad Company*, 32 Fed. 9, has been often quoted with approval:

"Nearly all the powers of the government are exercised over territory in which the United States and the several states have concurrent jurisdiction. It is only in exceptional cases that the United States desires to have exclusive jurisdiction, and a consequent cession of territory." (Italics ours.)

Notwithstanding this Oregon case counsel for appellant argue that the Federal government has acquired more than concurrent jurisdiction over lands which it purchased in connection with the Coulee project.

In fact, they seek to liken these lands to the reservation at Fort Lewis, where there was an express cession of exclusive jurisdiction over particular lands for purposes of a fort and where the Federal government accepted this exclusive jurisdiction, and (acting under authority conferred by act 1, section 8, clause 17, of the Federal Constitution) was actually maintaining a fort on the area for the support of the government.

United States v. Tucker, 122 Fed. 518, is the only case relied upon as holding that locks and dams are "needful buildings" within the meaning of the constitutional provision above cited. But that was a criminal case arising on demurrer to the indictment charging a crime under a Federal statute and presented by the United States Attorney. The

state's sovereign power of taxation was not involved. The indictment (which for purposes of the demurrer was taken to be true) charged that the "place" where the crime was committed was within the "exclusive jurisdiction" of the United States (both by consent and purchase and by express cession describing the lands).

The court stressed the fact that the government was actually using and governing the lands and that Congress had legislated with respect to crimes committed thereon.

It will be seen that the district judge, in overruling the demurrer, did so because the indictment made out a *prima facie* case; the rule being that such a serious question as "exclusive jurisdiction" should not be summarily disposed of.

Rodman v. Pothier, 264 U. S. at 402.

It must be pointed out in passing that crimes committed in the Coulee Dam area are in fact prosecuted in the state courts and that the Federal authorities have never assumed any of this burden.

In the *Tucker* case the land on which the structure was erected was being maintained for the permanent use of the government. In the case at bar, the government, at most, is simply aiding in the construction of a state project, essentially private in its nature.

In the *Tucker* case, the *government, itself, was claiming jurisdiction* and was actually exercising it.

In the case at bar, the contractor is attempting to make the claim of jurisdiction for the government. The government does not claim jurisdiction and by its contract it has required appellant to submit to the jurisdiction of the state.

If the decision of the district judge on the demurrer in the *Tucker* case is to be taken as a ruling on the authority of the Federal government to assume exclusive jurisdiction over lands purchased in connection with the exercise of powers conferred by the commerce clause, it is out of harmony with all of the decisions which have considered the matter, when involving the power to tax.

However, the question of exclusive jurisdiction was not involved in the *Tucker* case, and what was said by the district court on that question was wholly unnecessary to the disposition of the case. While such expressions may be respected, they do not control when the precise point has been presented for decision.

Brush vs. Commissioner of Internal Revenue,
81 Sup. Ct. Advance Opinions (L. Ed.)
No. 10 at page 451.

THE FEDERAL GOVERNMENT DOES NOT ACQUIRE EXCLUSIVE JURISDICTION OVER LANDS USED FOR IRRIGATION, RECLAMATION OR POWER PROJECTS

As a matter of fact, the present project is both a reclamation and irrigation and a power project. It is hoped that the sale of power will defray its

cost. Inasmuch as it is an irrigation and reclamation project, the work is being done under the direction of the Bureau of Reclamation rather than under the War Department as in the case of the Bonneville dam involved in the Oregon case of *Atkinson vs. State.*

Production and sale of electrical energy is, of course, a power reserved to the state and while title to lands in reclamation districts may nominally be in the United States, the state itself has been given jurisdiction to provide for the appropriation and use of the water in connection with the reclamation of such lands.

Brush vs. Commissioner of Internal Revenue, 81 Sup. Ct. Adv. Ops. (L. Ed.) No. 10, at 448;

Twin Falls Co. vs. Caldwell, 266 U. S. 85;

California-Oregon Power Co. vs. Beaver Portland Cement Company, 295 U. S. 142.

The case of *Six Companies vs. DeVinney,* 2 Fed. Supp. 693, is one of the earliest cases in which contractors engaged in the performance of public works contracts sought to escape state taxation by taking advantage of a general act consenting to the purchase of lands by the Federal government.

The case was very carefully considered and the opinion of the district court has been uniformly followed. The contractors were held to be taxable even though there had been some effort made to establish a *bona fide* reservation.

Six Companies were the contractors for the construction of the Boulder Canyon project. Unlike the case at bar, Congress had established what is known as the Boulder Canyon Project Federal Reservation. The state of Nevada had by general act, consented to the acquisition of land by the Federal government " * * * for sites for customs houses, court houses, forts or arsenals or other public buildings whatever, or for any other purpose of the government * * *."

The act of cession provided for exclusive jurisdiction for all purposes excetp the services of process, and provided that as long as the lands remained the property of the United States, they should be free from state and county taxes. The act required the filing of an accurate description and plat with the governor of the state. This was done and both the governor of the state of Nevada and the Federal officials treated the Federal Reservation as under the exclusive jurisdiction of the Federal government.

An act of Congress provided that the project was for the purpose of controlling floods, improving navigation, providing for reclamation of public lands and for the generation of electrical energy. It is, also, provided that the title to the dam, reservoir, plant and incident works, should forever remain in the United States and created a reservation.

The Secretary of Interior, in filing the plat, made his affidavit that it was a true representation of the area constituting the Boulder Canyon Federal Reservation of the United States, in Nevada. The description showed that the reservation contained certain lands held in private ownership.

In filing the plat and description, the Secretary of the Interior advised the Governor of the state that he did so pursuant to the 17th clause of article 1, section 8, of the Federal Constitution authorizing Congress to take and exercise jurisdiction.

The *Six Companies* case therefor, presents a much stronger case for exemption from state taxation, for there was an assumption of jurisdiction by the Federal government under an express act of Congress, while in the case at bar, there is no reservation, no congressional authority, and no attempt to exercise jurisdiction on behalf of the Federal government.

In the *Six Companies* case, as in the case at bar, the dams are being constructed in the beds of navigable rivers, title to which is in the state, subject to the right of the Federal government to use the same.

In denying immunity from state taxation in the *Six Companies* case, the Federal judge said:

"* * * Assuming that the said dam, power plant, and appurtenant works are within the meaning of the expressions in the state statute, 'other public buildings, whatever, or for any other purpose

of the government,' the question is presented whether the filing of a plat which is not only inclusive of such dam, plant, and appurtenant works, but is also inclusive of more than a hundred square miles of adjacent territory, is within the meaning of the provisions of the state statute.

"Statutes relinquishing jurisdiction are strictly construed. A controlling reason for such construction is that it is a matter of the very greatest importance to both the national and the state governments affected. *Larson v. South Dakota*, 278 U. S. 429, 49 S. Ct. 196, 73 L. Ed. 441."

Construing the state act, the Federal court said on page 698:

"*All the purposes specifically mentioned in section 1 of the state act refer to public buildings of a character the use of which would either be permanent or for an indefinite period of time, as distinguished from a mere incidental purpose manifestly of short duration.* The expression in the statute, 'for any other purpose of the government,' is governed by the rule *ejusdem generis*, and likewise refers to a purpose either of indefinite duration or of a permanent character.

* * * * * * *

"* * * *It is clear that the state act does not contemplate a ceding of jurisdiction over a site the use of which is not* only temporary but incidental to some other purpose. * * *" (Italics ours.)

Referring to the reclamation law under which the Secretary of the Interior is authorized to act on irrigation projects, the court further said:

"This law comprehends the acquisition by citizens of the United States of the land and water rights. *The law generally comprehends that its purposes will be carried out under national direc-*

tion, but, subject thereto, always without relinquishment of state jurisdiction. * * *" (Italics ours.)

The contractor was held to be taxable by the state in this case, notwithstanding the fact that the work was done under an express act of Congress, which was sustained in *Arizona v. California*, 283 U. S. 423, cited by appellant. The trial court correctly applied the principles laid down in these controlling decisions.

Nikis v. Commonwealth, 131 S. E. 236, is entirely in point as to the mercantile business conducted by appellant.

In that case, the supreme court of appeals of Virginia, had to deal with a mercantile establishment located on lands purchased by the Federal government with the consent of the state of Virginia, to be used for the approach to a bridge across a navigable river. It was there contended, as it is here, that the state of Virginia had divested itself of its sovereign rights. In disposing of this contention, the court said:

"That a bridge is not a building has been frequently decided, and it seems hardly necessary to say that an approach to a bridge which is a public highway is not a building.

"*In order to accord immunity from state taxation, the accused must not only sho wthat the land is acquired by the United States, but also that it is for one or more of the purposes so clearly indicated in article 1, section 8, clause 17, of the Constitution.* We are clear in our view that he is not entitled to any such immunity.

"It is suggested in the brief for the accused that the sole test is whether or not the land has been acquired in the manner referred to in the clause cited; that is over 'places purchased by the consent of the Legislature of the state in which the same shall be.' Clearly, however, this is not the sole test, *because it is manifest that the land must also be acquired for one of the specific purposes which are indicated in the clause, namely, for a fort, magazine, arsenal, dockyard, or other needful building.*" (Italics ours.)

THE STATE HAS NEITHER CONSENTED TO THE ACQUISITION OF TITLE TO THE COULEE DAM AREA NOR CEDED EXCLUSIVE JURISDICTION OVER THE SAME TO THE FEDERAL GOVERNMENT

Counsel for appellants rely upon one general statute of the State of Washington in order to make a claim that the state has consented to the purchase of the lands necessary for the Coulee Dam project or has ceded exclusive jurisdiction. All other statutes are ignored.

In the first place there are two general acts in this state whereby the state gave its consent to the purchase of property in the State of Washington by the Federal government. Both are limited to the situations where Congress is granted authority to exercise exclusive legislation by the following words, "* * * * the consent herein and hereby given being in accordance with the provisions of the 17th Clause of the 8th Section of the 1st Article of the Constitution of the United States, and with the acts

of Congress in such cases made and provided. * * *"

The first of these acts is the act of January 23, 1890, to be found on page 459 of the Session Laws for the years 1889 and 1890. Attached hereto is Appendix "A".

In this act the consent granted by the state is qualified by the proviso:

"* * * *Provided*, that a sufficient description by metes and bounds and an accurate plat or map of each such tract or parcel of land be filed in the proper office of record in the county in which the same is situated. * * *"

The plat or map required to be filed is a map showing the extent of the reservation over which the Federal government is assuming jurisdiction.

Construing such limited and qualified consent, in the case of an express grant of the property ceded for Fort Lewis, the circuit court of appeals for the first circuit said in *Pothier v. Rodman*, 291 Fed. at page 318:

"*It is apparent that this section* read in the light of the surrounding circumstances, *means that the sovereign right of the State of Washington over the land in question and the acquisition of exclusive legislative authority and jurisdiction by the United States thereover was not to take place when the land had been conveyed by deed, but only when, upon such conveyance being concluded, a sufficient description by metes and bounds and an accurate map of each such tract or parcel of land*, together with copies of orders, deeds, patents and other evi-

dences of title, *had been filed for record in the auditor's office of Pierce county.* * * *" (Italics ours.)

In the same case, the court ably stated the reasoning underlying the decision in *Ft. Leavenworth v. Lowe*, 114 U. S. 525, as follows:

"* * * The court also recognized in its opinion that the right of sovereignty of a state over land purchased by the United States within its boundaries was not to be taken away by implication; that the essence of the provision of the Constitution here under consideration was '*that the state shall freely cede the particular place to the United States for one of the specific and enumerated objects.* This jurisdiction cannot be acquired tortiously or by disseizin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state, when such occupancy is for the purpose of protection' (*People v. Godfrey*, 17 Johns. (N. Y.) 225. * * *" (Italics ours.)

This court also said that the actual occupancy of the land prior to filing the map "* * * had no tendency to show that the state had ceded its sovereignty, as the state's right of sovereignty is not to be taken away by implication."

In the case at bar, the government made no attempt to comply with the condition by filing the map, and counsel, therefore, seek to rely on section 1 of the act of February 24, 1891, which does contain a cession of jurisdiction for the limited purposes, the entire act being attached hereto as Appendix "B."

In construing this act two things are apparent.

First: The government did not intend to divest itself of the sovereign right of taxation because section 2 of the act (section 8109, Rem. Rev. Stat.) expressly exempts from taxation the land itself and the *appurtenances necessary for the purposes mentioned.*

Applying the rule of strict construction the intent of the legislature is shown to preserve the right of taxation as to private persons, their businesses and property as was done in the case of the express cession of jurisdiction over lands for Rainier National Park. (8110, Rem. Rev. Stat.)

Secondly: The legislature did not cede "exclusive jurisdiction." The word used was simply "Jurisdiction."

In such a case the reasoning of Mr. Justice Bradley in the "Arthur Kill" case applied: That the Federal government, not desiring exclusive jurisdiction, acquired only concurrent jurisdiction. It may exercise this jurisdiction to the full extent necessary to accomplish its purpose, but without extinguishing the state's sovereignty.

In the early case of *In re Kelly*, 71 Fed. 545, the decision turned upon the omission in the state act of the word "exclusive."

The question of the jurisdiction enjoyed by the Federal government over lands purchased by it with the consent of the state of Wisconsin and used for

a national home for disabled soldiers, was squarely presented.

The court avoided deciding the question of whether or not the state of Wisconsin had authority to divest itself of its sovereignty over lands which the Congress was not specifically authorized to govern by article 1, section 8, of the Federal Constitution by deciding that as a matter of fact, the Wisconsin act ceded less than exclusive jurisdiction.

This construction was made necessary simply because the state act omitted the word "exclusive." The court said:

"* * * *That it was not the legislative intent to abdicate all powers appears from the omission in the act of the word 'exclusive.' It simply grants 'jurisdiction over the several tracts' purchased. In the general sense, jurisdiction is not in its nature exclusive, but is concurrent. Com. v. Hudson*, 11 Gray, 64."

"* * * *Reading the Wisconsin act in the light of this rule, and in the view that the purpose was not one for which exclusive legislation was prescribed, either by the constitution or by congressional enactments, the omission of the word 'exclusive' or some equivalent term is material, and must be interpreted as ceding—that is, yielding or surrendering—to the United States such jurisdiction as Congress may find necessary for the objects of the cession and for the exercise of which there must be clear enactments to that end within its powers.* * * *" (Italics ours.)

And again the court said that to interpret a state act ceding only *jurisdiction* as ceding *exclusive jurisdiction*, would require

"* * * *terms of exclusion to be inferred, and would reverse the strict rule above indicated. It would further give an effect to the act against the apparent intention of Congress, and opposed to the intention, and possibly beyond the powers, of the state legislature. The inmates and any inhabitants of the tract are otherwise placed without the protection of local laws, and without civil laws or privileges. I cannot believe that such construction is either just or permissible.*" (Italics ours.)

On page 549 the court stated the rule to be that legislative consent operates as a complete cession only as to objects which are distinctly specified in clause 17, section 8, article 1 of the Federal Constitution, and "* * * cannot be held to so operate, *ipso facto*, for objects not expressly included therein * * *."

The court then said that the power of Congress to extend its right to exercise exclusive jurisdiction under the guise of "needful buildings" was not presented in the record, but quoted the following extract from the opinion of the supreme court of the United States, in *New Orleans v. United States*, 10 Pet. 662, 737.

"'Special provision is made in the constitution for the cession of jurisdiction from the states over places where the Federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.'"

Following this quotation, the court in the *Kelly* case said:

"But, whatever may be the rule pronounced when that question arises, it appears indisputable that all state jurisdiction is not excluded from every parcel of land purchased by the general government in a state with legislative consent, irrespective of its use; and, therefore, that if the purpose is not one of those distinctly named in this clause of the constitution, the act of Congress which provides for the purchase and requires the legislative consent must in some unequivocal terms declare that exclusive jurisdiction is intended and necessary for the proposed use, or at least the purpose stated must be one of which it is manifest that any exercise of coordinate or other jurisdiction would be incompatible therewith. (Italics ours.)

"* * * In no sense do these enactments intend works or establishments for the public safety or defense, or for military purposes; nor do they contain any declaration, or suggestion even, of requirement or need of exclusive legislation over the lands purchased and employed for the homes; nor is there any provision which is incompatible with the operation of the civil and criminal laws of the locality aside from the regulations mentioned. * *"

In the case at bar, the same reasoning applies. The lands are not necessary for public safety, defense or military purposes; nor is there any requirement or need of exclusive legislation on the part of the Federal government.

The court was influenced in deciding the *Kelly* case by the prompt action of Congress to meet the effect of the decision of the supreme court of Ohio in the early case of *Sinks v. Reese*, 19 Ohio State 306.

The Ohio court there considered an act ceding

lands to the Federal government for a soldiers' home, as ceding "exclusive jurisdiction." To avoid disenfranchisement of inmates of the home, Congress promptly relinquished jurisdiction to the state. (16 Stat. 399, Act of Jan. 21, 1871.)

A later case and one more nearly in point as to the character of the use by the Federal government, is *Oscar Danials Co. v. City of Sault Ste. Marie*, 175 N. W. 160. In this case the supreme court of Michigan considered the question of the right of the state of Michigan to tax the personal property of a contractor whose office and principal place of business was in the county of Illinois and who was present in the state of Michigan for the purpose of performing a contract with the Federal government to build a lock at the falls of St. Mary's river in that state. The supreme court of Michigan stated the question as follows:

> "Upon the main proposition as to whether the tax was rightfully laid, we are to consider whether the jurisdiction of the state extended for that purpose to any personal property situated and used on the ceded lands. If the territory is beyond the jurisdiction of the state and within the exclusive jurisdiction of Congress, as the trial court held, then the judgment is right. * * *"

In deciding this question the court was met at the outset with a prior decision. (*Willis v. Oscar Danials Co.*, 200 Mich. 19, 166 N. W. 496) in which it had held that a contractor performing a contract with the Federal government on said lands was not

under the workmen's compensation act of the state of Michigan.

But when the supreme court of the state of Michigan in the *Oscar Danials Co.* case was presented with a question of whether or not the lands theretofore ceded by the state to the Federal government for the ship canal were without the jurisdiction for tax purposes, it decided the case quite differently.

It was pointed out that in the *Military Reservation cases*, such as *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, there was a cession of "exclusive jurisdiction."

The supreme court of Michigan thereupon decided that the state of Michigan had not divested itself of its sovereignty and that the lands were within the state so that the state could tax persons doing business or living thereon.

In so holding the court said:

"In the case at bar, there is not, in terms, as there was in the case of the Ft. Leavenworth Reservation, a cession to the United States of exclusive jurisdiction,

* * * * * *

" * * There was no occasion for the state to cede exclusive jurisdiction to the United States, no apparent reason for denying to the state such jurisdiction, legislative and other, as did not interfere with the control by the United States of the property transferred for the purposes of the transfer.*

"*We construe the grant itself as a cession of less than exclusive jurisdiction*, and the proviso as it was construed in *Willis v. Oscar Danials Co.*, *supra*. In this view, the ceded territory is not out of the state of Michigan so far as the operation of its tax laws is concerned, but is within the state. The tax levy in question was properly made, and the tax was a lawful one." (Italics ours.)

In the case at bar, the Federal government has required appellant to submit to the jurisdiction of the department of labor and industries and he actually paid premiums into the workmen's compensation fund and received the benefit of the workmen's compensation act.

The decision of the supreme court of Michigan is most persuasive in view of the fact that the Michigan authorities (being authorized so to do by the legislature), had conveyed the canal with all buildings and public works thereon to the government.

Whereas, in the case at bar, the Federal government is simply using state lands, title to which remains in the state.

The case of *Palmer v. Barrett*, 162 U. S. 399, involved an act of the New York legislature ceding "* * * the jurisdiction of this state * * *" rather than "exclusive jurisdiction." In holding that the state retained jurisdiction, however, the court relied upon a provision that the land should revert, if the specified use ceased, and the fact that the government had made a lease of a portion of

the grounds which required the city authorities to patrol and police them.

In the case at bar, all contracts require the lands to be under the care of the state in such matters.

The rule as to the capacity in which the Federal government holds lands acquired by condemnation is well stated in *Barrett v. Palmer*, 31 N. E. at page 1018, as follows:

"* * * The power of the Federal government to acquire lands within a state for governmental purposes cannot be so exercised as to dismember the state, and separate a part of its territory from its jurisdiction. *When the lands are acquired by the exercise of the power of eminent domain, the United States becomes simply an ordinary proprietor, and the jurisdiction and authority of the state over the lands remain unchanged, except so far as their use for the purpose of executing the powers of the general government necessarily removes them from the domain of state authority.* * * *" (Italics ours.)

It is apparent that neither of the general acts of Washington consenting to the purchase of lands by the Federal government were intended to apply to a project such as that involved in the case at bar. Neither act authorized the Federal government to acquire lands from the state (as was the case in Michigan). This was decided in *State ex rel. Bussell v. Calvert*, 33 Wash. at page 390.

Both acts were discussed in that case. The court after pointing out that the consent was given strictly in accordance with the terms of clause 17,

section 8 of article 1, of the Federal Constitution, construed the acts strictly and said:

"* * * We do not think that it can reasonably be said that, when the legislature granted to the United States the *consent* of the state to acquire, by purchase or by condemnation, land from individuals or bodies politic, *within this state*, for specified purposes, they intended thereby to grant consent to purchase lands *from the state*. If such was their intention, we think they would have expressed it in plain and unequivocal language."

To ascertain the intent of the legislature (the project being on state lands, and privately owned lands being only incidental thereto) we must, therefore, look further.

OTHER STATUTES OF THE STATE OF WASHINGTON CONTEMPLATE A USE ONLY BY THE FEDERAL GOVERNMENT WITH RETENTION OF JURISDICTION AND A REVERTER TO THE STATE

The applicable statute is also pointed out in *Bussell v. Calvert*, 33 Wash. at page 386, as the act of March 20, 1890 (Laws of 1890, page 428). Referring to this act, the court said in the *Bussell* case at page 386:

"By an act of the legislature approved March 20, 1890, the state granted to the United States the *use* of any tide lands belonging to the state and adjoining and bordering on any tract, piece, or parcel of land held or reserved by the government of the United States for the purpose of erecting and maintaining thereon forts, magazines, * * * and other needful buildings, so long as the upland adjoining such tide lands shall continue to be held by

the government of the United States for any of the public purposes therein mentioned. This act also provides that, whenever the government of the United States shall cease to hold for public purposes any such tract, piece, or parcel of land, *the use of the tide lands bordering thereon* shall revert to the State of Washington. Laws 1890, p. 428.

"It will be observed that this act simply granted to the government of the United States the *use* of tide lands belonging to the state, upon the conditions, and for the time therein specified. *It does not seem to contemplate a conveyance of an estate in fee, but rather an easement of an indefinite duration.* * * *" (Italics ours.)

This act, as amended by chapter 110, Laws of 1909, to include other aids of navigation, is section 8116, Rem. Rev. Stat. It was passed at the very session of the legislature which enacted the general act of January 23, 1890, and shows that the state simply granted to the Federal government the use of its lands with a clause providing that the use shall revert to the state in the event the uplands cease to be held for the purposes intended.

Section 8118, Rem. Rev. Stat., provides that upon proper application *an easement* may be granted to the United States. Section 8119, Rem. Rev. Stat., provides for a reservation whenever the United States shall cease to hold and use any uplands for the purposes mentioned.

It has been seen that where a reversionary right is retained by the state, the courts have held that exclusive jurisdiction is not ceded.

The Coulee project is, also, a power and irrigation project. In so far as it is a power project, it is not governmental at all, and partakes of the nature of private business, which will ultimately be conducted either by the state itself, or by a private corporation acting under the laws of the state.

In so far as it is an irrigation or a reclamation project, the function is not strictly governmental, but one exercised for the general good of the people and in aid of the government's proprietary interests.

Twin Falls Canal Co. v. Foote, 192 Fed. 583.

As it was pointed out by the court in *Six Cos. v. De Vinney*, 2 Fed. Supp., at page 698, the Reclamation Law, under which the Secretary of the Interior acts, * * * comprehends that its purposes will be carried out under national direction, but, subject thereto, *always without relinquishment of state jurisdiction.*"

The same court in the same case pointed out that under the Reclamation Law there was authority to establish townsites on these projects "* * * *subject to local state jurisdiction.*" (Italics ours.)

The same court also pointed out, in this same case, that if it were assumed that a dam, power plant and appurtenant works were needful buildings, it could not be that this would authorize exclusive jurisdiction over hundreds of miles of adjacent territory.

The Secretary of the Interior, under the Federal act, has power to acquire any lands necessary for such a project or for the purpose of being benefited by the project. These lands will be held by the government in its proprietary capacity, but will remain under the jurisdiction of the state. The Secretary of the Interior would have no authority to assume exclusive jurisdiction over them for the Federal government, if he tried.

The rights of the Federal government as to power and irrigation projects, and as to the Columbia River Basin project, particularly (section 7416-1, Rem. Rev. Stat.), are covered by sections 7408 to 7416, Rem. Rev. Stat.

Section 7408 gives the right of eminent domain to acquire lands or property for such a project.

Section 7410 provides for notice of investigation by the Federal government, during which investigation, its right to use the waters in this state will be protected.

Section 7411 covers the subject of the title which may be acquired by the Federal government and specifically provides that when all conditions are complied with, title to the beds and shores of any navigable lake or stream to be utilized for such projects shall vest in the United States only "* * * *to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works.*" (Italics supplied.)

Section 7412 provides that on completion of such a project, the filing of a plat with the Commissioner of Public Lands is necessary before any reservation shall ripen into a grant.

Section 7416 grants the right, "* * * to construct and maintain dams and works incident thereto over, upon and across the beds of rivers of the State of Washington * * *," and specifically provides "* * * for an *easement of necessary portions of the beds of* such rivers." It is specifically provided that all rights under this easement shall be forfeited and "* * * revert to the state * * *" in the event of failure to use such dams and works for a continuous period of two years.

It is apparent that section 8108, Rem. Rev. Stat., relied upon by appellant, was not intended to and does not apply to the Coulee Dam project. It is also apparent that the state retains jurisdiction and that the Federal government acquires only what the courts have referred to as all it wants, namely, the right to use the lands for the particular purpose.

In determining such a serious question, all acts of the state legislature and of the Congress must be considered. Wherever possible such a construction should be placed on these acts as will not cause the state to lose its jurisdiction over the ceded lands, nor the inhabitants thereof, their rights and privi-

leges as citizens of the state, nor to absolve these inhabitants from their duties to the state.

State v. Allman (Tenn.), 68 S. W. (2), page 478.

The supreme court of the United States said in *Larson v. South Dakota*, 278 U. S., at page 436:

" 'But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. * * *'"

* * * * * *

"' * * * *A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished.* * * *'" (Italics ours.)

Accordingly, the word "jurisdiction," as used in compacts between states over bordering territory, is construed in a more limited sense than sovereignty.

Central Ry. Co. v. Jersey City, 209 U. S. 473.

And the state of Georgia did not acquire sovereign rights over property in Tennessee acquired with the permission of that state for railroad purposes. In *Georgia v. Chattanooga*, 264 U. S. at page 481, the supreme court of the United States said in so holding:

"* * * The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. *It occupies the same position there as does a private corporation author-*

ized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity. Bank of the United States v. Planters' Bank, 9 Wheat. 904; *Bank of Kentucky v. Wister,* 2 Pet. 318, 323; *Louisville, C. & C. R. R. Co. v. Letson,* 2 How. 497, 550; *South Carolina v. United States,* 199 U. S. 437, 463. * * *." (Italics ours.)

In the case at bar, the Federal government has acquired railroad rights of way in the State of Washington. It holds these lands as a proprietor and the lands remain within the state just as they would, if the railroad were operated by a private corporation. (Indeed it is being operated and maintained by the M. W. A. K. Company as an independent contractor.)

The Federal government does not claim sovereignty or exclusive jurisdiction over this ribbon of right of way thirty miles long and one hundred feet wide. There is a compelling reason for this: The Congress has no constitutional power to exercise exclusive legislation or jurisdiction over lands used for railroad purposes, unless in connection with a fort, or in a time of war.

Appellant's Contention That the Legislature Had Power to Cede Exclusive Jurisdiction Is Not Supported by the Authorities

Counsel for appellant, apparently realizing that the purposes for which the property was acquired, or the use of which was acquired in the case at bar, are not within the scope of clause 17 of section 1 of

article 8 of the Federal Constitution, argue that the cession contained in section 8108, Rem. Rev. Stat., should be construed as a cession of sovereignty.

In the first place, counsel overlook the great difference between "jurisdiction" and "exclusive jurisdiction." At the most, if section 8108, Rem. Rev. Stat., applies, the United States received only concurrent jurisdiction (the purposes not being strictly within clause 17).

Counsel seeks to support his contention by citing language from *Ft. Leavenworth v. Lowe*, 114 U. S. 525; and *Concessions Co. v. Morris*, 109 Wash. 46. However, both of these cases involved lands ceded for purposes of a fort; strictly within the scope of clause 17. The cases must, of course, be read in light of the facts.

The *Concessions* case involved a special act ceding "*exclusive jurisdiction*" to particularly described lands for purposes of a military reservation, the terms of which were accepted and complied with by the Federal government.

It has already been remarked that the court in the *Ft. Leavenworth* case emphasized the necessity of the cession being for *one of the enumerated and specific objects of clause 17, before the cession would operate to give the United States exclusive jurisdiction.*

The reason is plain; the state can only abdicate its sovereignty where the United States has author-

ity to assume sovereignty. The United States may not exercise sovereignty over the property adjacent to the Columbia river, except for the purposes specifically mentioned in clause 17, and the operation of a power plant and irrigation project is clearly not one of them.

A case which is in point is: *In re O'Conner*, 37 Wis. 379. In this case, referring to a purchase made for a purpose within clause 17 and with the consent of the state, the Wisconsin court said on page 384:

"* * * When the purchase is made in this manner, and for such an object, then *Congress may, if it sees fit to do so, extinguish all state authority and jurisdiction over the place so acquired, and vest exclusive jurisdiction over it in the Federal courts.* * * *" (Italics ours.)

Again the same court said on page 385:

"* * * *And even in that case, if Congress has not exercised its exclusive right of legislation over the place, the jurisdiction of the state to support and maintain its laws, and to punish crimes committed within its acknowledged limits, will be asserted and maintained.* * * *." (Italics ours.)

It appearing that the legislature of Wisconsin had attempted to cede jurisdiction for a purpose not clearly within the scope of clause 17, the Wisconsin court said at page 387:

"* * * *True, it appears that the legislature by ch. 275, P. and L. Laws of 1867, attempted to cede to the United States jurisdiction over the lands upon which the national home was to be located; but if the United States did not actually acquire*

*these lands as a sovereign power, in the mode and for the purpose authorized by the constitution, this act of cession by the legislature is void. For it is not competent for the legislature to abdicate its jurisdiction over its territory except where the lands are purchased by the United States, for the specific purposes contemplated by the constitution. When that is done, the state may cede its jurisdiction over them to the United States; and, should Congress see fit to exercise its exclusive right of legislation over the place, the state jurisdiction would be completely ousted. * * *".* (Italics ours.)

As Congress had created a corporation to manage the Soldiers' Home involved in the *O'Conner* case, the court said at page 389:

"* * * *Congress might, with the consent of the state, purchase land for an arsenal, and exercise full and absolute sovereignty over the ceded territory. But, suppose Congress should incorporate a company with power to build and maintain an arsenal for the manufacture and storage of arms and other munitions of war, would the case stand upon the same ground, and would the implication arise that the state had lost jurisdiction over the arsenal belonging to the corporation? * * *"* (Italics ours.)

The holding of the *O'Conner* case is, in effect, followed in *Clarke v. County of Milwaukee*, 9 N. W. 782.

In *Mallory v. Wheeler*, 151 Wis. 136, the supreme court of Wisconsin referred to: *In re O'Conner*, 37 Wis. 379, as holding:

"* * * that it was not competent for the legislature of Wisconsin to abdicate its jurisdiction

over this territory except where the lands are purchased by the United States for the specific purposes contemplated by the constitution." (Italics ours.)

In *Illinois Central Railroad vs. Illinois*, 146 U. S. 387, at page 453, the supreme court of the United States considered the authority of the state to divest itself of its jurisdiction of lands under navigable waters. The court said:

"* * * A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.* In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State." (Italics ours.)

Article XXIV of our constitution specifically fixes the boundaries of the State of Washington.

No provision is made for changing these boundaries or altering the territorial limits.

Article XXV, which consents to exclusive legislation by Congress, limits that consent to the specific purposes mentioned in clause 17 with a further proviso requiring a filing of an accurate plat or map with "* * * a description by metes and bounds * * *."

By the fourteenth amendment to the constitution of the State of Washington it is provided that:

"The power of taxation is never to be suspended, surrendered, or contracted away. * * *"

Construing section 8108, Rem. Rev. Stat., in connection with the constitutional limitations and the other statutes of the State of Washington, it is apparent that it was not intended to apply and could not apply to either tide or shorelands or section 36, which is the section of school lands belonging to the State of Washington necessarily used by the government in connection with the Coulee Dam project.

As to lands which had been in private ownership and which were necessarily acquired for the project, title to the same rests in the United States government or in the state in trust for public purposes and legislative jurisdiction remains in the state, the Federal government having such jurisdiction only as may be necessary to carry out the projects.

CONCLUSION

Counsel for appellant apparently makes the extremely narrow point that the particular part of the work on the dam and power plant performed by appellants was done on lands purchased by the government above high water mark, tacitly admitting that other portions of the work upon the dam and power plant would have to be performed on tide and shorelands, title to which rests in the state.

Likening the Coulee Dam project to a building, this argument would be that a contractor building one wing of the building would be in the State of Washington and the contractor building another wing would be outside of the state.

If authority is needed to refute this argument, it will be found in each and every case cited by appellants, for they all involve reservations of definite boundaries used by the government in connection with the maintenance of forts or buildings permanently necessary for occupation by the government.

It is admitted that there still is no reservation by metes and bounds. Land is still being acquired as it becomes necessary.

Appellants in the cases at bar were required to submit to the workmen's compensation law of the State of Washington. As the supreme court of Oregon pointed out in *Atkinson vs. State Tax Commission*, 24 Ore. Adv. Sheets, at page 551, it seems rea-

sonable to assume that the Federal officials understood that the land included in the project was not under the exclusive legislative jurisdiction of the United States. Otherwise, they would not have required the contractors to provide state workmen's compensation and would have required the contractors to provide Federal employees' compensation under U. S. C. A. 5, section 751, as in the case of *Webb vs. White Engineering Corporation* (Ala.), 85 So. 729.

The facts in the case of *Silas Mason Co. vs. Tax Commission of the State of Washington*, now on appeal to this court as No. 773, which are made a part of the record in this case by stipulation, show that in subsequent contracts, the Federal officials went further and required the contractors to submit to legislative jurisdiction of the state in respect to school facilities, police protection, sanitation and, in short, to submit to the jurisdiction of all regularly constituted state and county authorities.

It is submitted that the Federal government has not only failed to assume exclusive jurisdiction but has indicated in every way possible that it does not wish exclusive jurisdiction and does not wish to deprive the residents of such a vast area of the right to vote and the enjoyment of the privileges of citizens of the State of Washington.

It is therefore submitted that the judgment of

the supreme court of the State of Washington should be affirmed.

Respectfully submitted,

G. W. HAMILTON,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellees.

APPENDIX "A"

(Laws of Washington for 1889-90, page 459)

CONSENTING TO THE PURCHASE OF LANDS BY THE UNITED STATES

AN ACT giving the consent of the Legislature of the State of Washington to the purchase and reservation by the United States of land within this State for public purposes, and expressing an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. That the consent of the legislature of the State of Washington be and the same is hereby given to the purchase, by the government of the United States or under the authority of the same, of any tract, piece or parcel of land from any individual or individuals, bodies politic or corporate, within the boundaries of this state, for the purpose of erecting and maintaining thereon armories, arsenals, fortifications, magazines, navy-yards, dock-yards, custom-houses, light-houses and other needful public buildings or establishments whatsoever; the consent herein and hereby given being in accordance with the provisions of the seventeenth clause of the eighth section of the first article of the constitution of the United States, and with the acts of Congress in such cases made and provided. And like consent of the legislature of the State of Washington is hereby given in the cases of all such tracts or parcels of land as have been heretofore pur-

chased by the government of the United States, or which have been or may hereafter be reserved by the said government, out of any public land belonging to the United States, for any of the purposes before mentioned: *Provided*, That a sufficient description by metes and bounds and an accurate plat or map of each such tract or parcel of land be filed in the proper office of record in the county in which the same is situated; together with copies of the orders, deeds, patents or other evidences in writing of the title of the United States: *And provided, further*, That all civil process issued from the courts of this state, and such criminal process as may issue under the authority of this state against any person charged with crime, in cases arising outside of such purchases or reservations, may be served and executed thereon in the same mode and manner and by the same officers as if the consent herein given had not been made.

Sec. 2. In order to facilitate the operations of the government of the United States in the defense and proper lighting of the coasts of this state, and in continuing works of public improvement undertaken by the government of the United States, this act shall take effect immediately upon its passage.

Approved January 23, 1890.

APPENDIX "B"

(Laws of Washington for 1891, page 31)

CEDING JURISDICTION TO THE UNITED STATES

AN ACT to cede the jurisdiction of the State of Washington to the United States of America over land needed for the improvement of rivers and harbors, and for the purchase and condemnation thereof.

Be it enacted by the Legislature of the State of Washington:

Section 1. That the consent of the State of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy yards, naval station, or other needful buildings authorized by any act of Congress, and all deeds, conveyances of title papers for the same shall be recorded, as in other cases, upon the land records of the county in which the land so acquired

may lie; and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States which may be set apart by the general government for any or either of the purposes before mentioned by an order, patent or other official document or papers describing such land; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the constitution of the United States, and with the acts of congress in such cases made and provided, and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: *Provided*, That this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein in the same manner and with like effect as though this assent and cession had not been granted,

Sec. 2. The tracts, pieces or parcels of land so acquired or set apart, together with the tenements

and appurtenances for the purposes before mentioned, shall be held exempt from taxation by the State of Washington.

Approved February 24, 1891.

APPENDIX "C"

(Laws of Washington for 1890, page 386)

GRANTING CERTAIN LANDS TO THE UNITED STATES

AN ACT granting to the United States, for public purposes, the use of certain tide-lands belonging to the State of Washington.

Be it enacted by the Legislature of the State of Washington:

Section 1. That the use of any tide-lands belonging to the State of Washington, and adjoining and bordering on any tract, piece or parcel of land held or reserved by the government of the United States for the purpose of erecting and maintaining thereon forts, magazines, arsenals, dock yards and other needful buildings, be and the same is hereby granted to the United States so long as the upland adjoining such tide-lands shall continue to be held by the government of the United States for any of the public purposes above mentioned: *Provided*, That this grant shall not extend to or include any lands covered by more than four fathoms of water at ordinary low tide: *And provided further*, That whenever the government of the United States shall cease to hold for public purposes any such tract, piece or parcel of land, the use of the tide-lands bordering thereon shall revert to the State of Washington.

Approved March 20, 1890.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

DAVID H. RYAN,
Appellant,
vs.
THE STATE OF WASHINGTON, *et al.*,
Appellees.
No. [redacted] 8

BRIEF OF AMICUS CURIAE

E. P. DONNELLY,
Counsel for Appellees.
E. W. SCHWELLENBACH,
Of Counsel.

Post Office Address:
Ephrata, Washington.

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1936

DAVID H. RYAN,	)	
Appellant,	)	
vs.	)	No. 774
THE STATE OF WASHINGTON, *et al.,*	)	
Appellees.	)	

MOTION FOR LEAVE TO FILE BRIEF AND TO PARTICIPATE IN ARGUMENT AS AMICUS CURIAE

E. P. DONNELLY,
Counsel for Appellees.
E. W. SCHWELLENBACH,
Of Counsel.

Post Office Address:
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IN THE

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OCTOBER TERM, 1936

DAVID H. RYAN,	)	
Appellant,	)	
vs.	)	No. 774
THE STATE OF WASHINGTON, *et al.,*	)	
Appellees.	)	

MOTION FOR LEAVE TO FILE BRIEF AND TO PARTICIPATE IN ARGUMENT AS AMICUS CURIAE

Comes now E. W. Schwellenbach, Prosecuting Attorney of Grant County, State of Washington, and moves the Court that leave be granted to the said E. W. Schwellenbach to file a brief as amicus curiae in the above entitled cause and that leave be granted to him to participate as amicus curiae in an oral argument of said cause before the bar of this Court during a por-

tion of the time allotted to counsel to appellees for oral argument.

This motion is based upon the records and files in said cause and upon the hereunto attached affidavit of E. W. Schwellenbach.

E. P. DONNELLY,
Counsel for Appellees.
E. W. SCHWELLENBACH,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

DAVID H. RYAN, *Appellant,*
vs.
THE STATE OF WASHINGTON, *et al.*, *Appellees.*
No. 774

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF, ETC.

State of Washington)
) ss.
County of Grant)

E. W. SCHWELLENBACH, being first duly sworn upon his oath, deposes and says: That affiant

is the duly elected, qualified and acting Prosecuting Attorney of Grant County, State of Washington; that affiant is preparing and has prepared a brief in this cause; that the taxing officials of said Grant County, Washington, levied general ad valorem taxes against the machinery, tools and personal property of David H. Ryan, appellant herein, for the taxing years of 1934, 1935 and 1936 in the total amount of $2,865.78; that in cause No. 4692, records and files of said Grant County, Washington, said David H. Ryan sought to enjoin said officials from collecting said taxes on the grounds that the State of Washington by Section 8108 of Remington's Compiled Statutes had ceded to the United States Government exclusive jurisdiction over the property upon which said David H. Ryan had performed his contract; that it was stipulated between said David H. Ryan and said taxing officials of said Grant County that the decision in said cause No. 4692 be rendered in accordance with the final determination of the cases entitled "David H. Ryan vs. State of Washington" and "David H. Ryan vs. Tax Commission, et al."

That affiant assisted the Attorney General in the trial of said case before the Superior Court of Thurston County, Washington, and appeared amicus curiae before the Supreme Court of the State of Washington upon the appeal of said cases.

That Silas Mason Company, Incorporated, have paid their ad valorem taxes in the amount of $25,911.00 to Grant County, Washington, under protest and will seek a return of said money so paid and will refuse to pay any taxes in the future, in the event that it should be determined by this Court that the State of

Washington has no jurisdiction over the area involved; that said Grant County, Washington, is therefore vitally interested in the outcome of this case.

E. W. SCHWELLENBACH

Subscribed and sworn to before me this 16th day of April, 1937.

BERNICE STROUF,
Deputy County Clerk-Auditor.

(*Seal*)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

DAVID H. RYAN, *Appellant,*
vs.
THE STATE OF WASHINGTON, *et al.*, *Appellees.*
No. 774

BRIEF OF AMICUS CURIAE

E. P. DONNELLY,
Counsel for Appellees.
E. W. SCHWELLENBACH,
Of Counsel.

Post Office Address:
Ephrata, Washington.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

DAVID H. RYAN, *Appellant,*
vs.
THE STATE OF WASHINGTON, *et al.*, *Appellees.*
No. 774

STATEMENT

It is my purpose to discuss only the question of federal jurisdiction. These two cases and the case of Silas Mason Company, Incorporated, vs. Tax Commission were all tried in the Superior Court at the same time, and, by stipulation of the parties, all of the evidence, insofar as it was material, was considered as applying to all three cases. The Supreme Court of the State of Washington found from the record and the exhibits introduced, the facts hereinafter set forth.

In passing, may I call attention to that portion of appellant's brief which reads as follows:

> "Counsel have stipulated that all of the lands upon which these contracts were performed by appellant were acquired by the United States, prior to the commencement of the work, by purchase with the consent of the State of Washington for the purpose of construction of a dam, with necessary appurtenances, across the Columbia River;"

At no place in the record was it stipulated that these lands were acquired with the consent of the State of Washington.

In 1933, the state legislature of the State of Washington created the Columbia Basin Commission, consisting of five members, and authorized them to enter into contracts and to employ any and all means necessary to secure the immediate development of the Columbia Basin project, which is a project to reclaim approximately 1,200,000 acres of arid land in Eastern Washington. This was to be done by the construction of a dam at the head of the Grand Coulee, which dam was to have a two-fold purpose, the furnishing of power and the furnishing of water for these arid lands. The commission secured an allocation of $377,000.00 from the sale of emergency relief bonds by the state for the purpose of commencing work on this project.

On June 30, 1933, the commission, in pursuance of its plan, entered into a contract with the United States, represented by the Bureau of Reclamation, Department of the Interior, wherein the United States agreed to make the topographic surveys and explorative work and to prepare the designs and specifications for the construction work on the dam, for which the

Columbia Basin Commission agreed to pay an initial sum of $50,000.00 at the execution of the contract and the balance of the allocation of $377,000.00 as the work progressed. The state has furnished practically all of this sum of $377,000.00.

On November 1, 1933, the United States, represented by the Secretary of the Interior, and pursuant to the reclamation laws and the National Industrial Recovery Act, and the State of Washington, acting through the Columbia Basin Commission, entered into a contract relating to the construction of the dam, power plant and power transmission lines at the Grand Coulee site on the Columbia River in which the United States agreed to expend the sum of $63,000,000.00 or so much as was necessary in the construction of said dam. (R. 26)

This agreement, among other things, contained the following:

Paragraph 9 recited that the increased amount of firm power made possible in the lower dams by reason of the storage behind the Grand Coulee dam was an important factor in making the lower dams self-liquidating. Paragraph 10 referred to the fact that the Columbia Basin Commission had been created by the state legislature for the purpose of cooperating with the federal government in securing the construction of the project and of the Grand Coulee dam.

Article 12 provides:

> "*Title to Constructed Works.* The United States will retain the title to the said dam and power plant and the operation and control thereof until the cost of the said project, including the cost of the said first unit dam and power plant, has

been fully repaid into the treasury of the United States."

Article 13 reads as follows:

> "13. *Commission to Act in Advisory Capacity.* The Commission will act as an advisory board representing the state in an advisory capacity in conferences with the officers of the United States concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines."

Article 14 provides that the state shall have an option, for a period of three and one-half years, to purchase the perpetual right to the entire power output of the first unit dam and power plant. Article 16 provides that the United States reserves the right to enlarge, alter and improve the dam and power plant, to change the machinery therein and to add other or additional power plants or power units.

It would seem that if the federal government, by acquisition of the land herein involved, acquired exclusive jurisdiction, it would not be necessary for it to make any reservations in any contract which it made with the State of Washington. From the foregoing it can plainly be seen that this is a joint project between the United States and the State of Washington.

On November 29, 1933, appellant entered into a contract with the United States for the excavation of overburden at Columbia River Damsite, Columbia Basin Project, Washington, for the sum of $534,500.00. The specifications, attached to and made a part of the contract, provided, among other things, that the ap-

pellant should obtain all required licenses and permits, should give preference, after ex-service men, to citizens who are residents of *the county and state in which the work was to be performed*, should furnish compensation insurance in compliance with the laws of the *state wherein the work was to be done*, and should comply with all applicable provisions of federal, state and municipal safety laws and building and construction codes.

Appellant entered upon the execution of the work under the contract about January 1, 1934, and completed it in the summer of the same year. On July 18, 1934, he entered into a second contract with the United States which was for the construction of a railroad at Grand Coulee dam, for the sum of $235,570.00. The railroad was to be 34.5 track miles in length, extending from the Northern Pacific railroad track at Odair, Washington, to the damsite. The specifications in this contract contained the same provisions as in the contract for the excavation.

On July 16, 1934, which was two days before the execution of appellant's second contract, the United States entered into a contract with the Silas Mason Company, Incorporated, for construction work on the Grand Coulee dam and power plant, Columbia Basin Project, Washington, for the sum of $29,339,301.50.

The specifications attached to the Silas Mason Company, Incorporated contract provided, among other things, and in addition to what has already been mentioned, that the contractor should make all necessary arrangements with the proper *state and county authorities* for school facilities; and that police protection for the contractor's camp and the area involved in and

surrounding the construction work would be furnished by the Washington State Patrol in cooperation with the federal government, but that the contractor should provide, at its camp site, such jail facilities as were satisfactory to the Washington State Patrol.

The original plan was to construct the dam as a power project. After the Silas Mason Company had commenced to perform their contract, however, the specifications were changed to lower and widen the dam so that it is a base for the ultimate higher dam to be used for the irrigation of all of the Big Bend section and involving a great many acres. (R. 17, 18 and 19)

The area included in the entire project is very extensive, covering many acres of land on both sides of the Columbia River. A large lake for reserve purposes will be made to the north, and, in that process, a great many thousand acres of land will be necessary for the ultimate project. In the ultimate project there will be public land, privately owned land, some state and county lands, some school lands and also tribal lands. The land is being acquired by the federal government as and when it is needed. (R. 18 and 20)

There are two school districts in the area involved, one in the government Engineer's Town and one in the contractor's camp at Mason City, both of which have been regularly formed under the laws of the State of Washington. (R.20 and 21)

The policemen in Mason City employed by the Silas Mason Company have been deputized as deputy sheriffs of Okanogan County. The attorney for the Silas Mason Company located at the contractor's camp in Mason City has been appointed justice of the peace in Okanogan County. Prior to the enactment of the

Washington State Liquor Law, a number of beer parlors were being operated on this land acquired by the federal government, under permits issued by the county commissioners of Grant County. At various times the sheriff of Grant County was called to this territory to investigate law violations and to arrest law violators. At various times the coroner of Grant County was called to investigate the deaths of men who were killed while performing labor in the construction of the work, on this land acquired by the government. (R. 21)

The state has established a Health Office in that territory and has also maintained the State Police over this area. Neither the state, nor any of its subdivisions have at any time recognized the exclusive jurisdiction of the federal government over any of this area. The federal government has not at any time attempted to exercise exclusive jurisdiction over any of this territory. On the contrary, in all of its dealings, it has recognized the jurisdiction of the state and of its various subdivisions over this entire area. As a matter of fact, the only people who have ever claimed that this area is under the exclusive jurisdiction of the federal government are some contractors who wish to evade the payment of their taxes.

ARGUMENT

Appellant contends that he is exempt from taxation because he operated on territory which he claims was purchased by the federal government and that the state legislature, by the enactment of Section 8108, Remington's Revised Statutes, in 1891, ceded exclusive jurisdiction to the federal government, thereby making this particular area an independent sovereignty

over which the State of Washington has no jurisdiction. In other words, he contends that the foregoing factors resulted in the carving out from the State of Washington of an entirely new sovereignty which we might call the District of Grand Coulee and which is entirely surrounded by the State of Washington but over which the State of Washington has no jurisdiction.

The reason for the enactment of this provision in the federal constitution is very well explained by Ordronaux in his work on "Constitutional Legislation." This is found on Page 764 of State ex rel Jones vs. Mack, 47 Pac. 763, as follows:

> "The functions of the general government demanding the establishment of forts, magazines and dockyards and the erection of post offices, courthouses, mints and other buildings, in various parts of the United States, the framers of the constitution made provisions accordingly for acquiring the necessary sites. It was contemplated that such places should be purchased either from states or individuals, and, as it was necessary, for their better government, that congress should have exclusive legislation over them, the clause requiring the legislature of the state making the cession was introduced, in order to avoid conflicts of jurisdiction."

The reason is further explained in Fort Leavenworth Railroad Company vs. Lowe, 114 U. S. 264, 266 as follows:

> "Upon the second part of the clause in question, giving power to "exercise like authority," that is, of exclusive legislation "over all places

purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," the Federalist observes that the necessity of this authority is not less evident. "The public money expended on such places," it adds, "and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned in every such establishment." "The power," says Mr. Justice Story, repeating the substance of Mr. Madison's language, "is wholly unexceptionable, since it can only be exercised at the will of the State, and therefore it is placed beyond all reasonable scruple."

It can readily be seen that the sole purpose of this constitutional provision was to prevent a duplication or conflict of authority which might interfere with the federal government in its protection of the safety and welfare of its people. There is no conflict of authority in the construction of the Grand Coulee dam. It is being built by private contractors with federal money under the supervision of the Department of Interior with the cooperation of the State of Washington. The federal government and the State of Washington are both exercising concurrent jurisdiction with absolutely no conflict between either.

The leading case on this question is Fort Leaven-

worth Railroad Company vs. Lowe, supra. It held, at Page 266, in referring to the constitutional provision:

> "The consent of the States to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the General Government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals."

And again, at Page 269:

> "The essence of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously by disseisin of the State; much less can it be acquired by mere occupancy, with the implied or tacit consent of the State, when such occupancy is for the purpose of protection.
>
> "Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualfication: that if upon them forts, arsenals, or other public buildings are erected for the uses of the General Government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference

and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the General Government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits."

That case laid down the following rules respecting the jurisdiction of the federal government over lands acquired by it:

1. When land is acquired by the United States for one of the purposes within Article 1, Section 8, Clause 17 of the Federal Constitution, by purchase with the consent of the State, federal jurisdiction is exclusive over such area for all purposes.

2. When land is acquired for one of the purposes within that Clause, but other than by purchase with the consent of the State, then federal jurisdiction is exclusive only to the extent of the purpose for which the land is held.

3. When land is acquired for a purpose not within that Clause, but the State by an independent act expressly cedes jurisdiction to it, the United States has such jurisdiction as may be ceded to it by the particular act of cession.

4. When land is acquired for a purpose not within that Clause, and jurisdiction has not been ceded by an express act of the State, the United States holds the

land just an any other proprietor does, except that the land may not be taxed by the State.

Now let us consider under which one of these rules this particular land was acquired. It should be borne in mind that the constitutional provision is limited to lands acquired, only, for the erection of forts, magazines, arsenals, dockyards and other needful buildings. The only possible provision under which this acquisition of property could come would be "other needful buildings." It can easily be seen that post offices, courthouses, mints, military hospitals, customs houses, penitentiaries, training schools, soldiers' homes and Indian schools would come under the definition of "needful buildings." These are all used for the strict purpose of carrying on the business of the national government and, if there were any conflict of jurisdiction over any of them, it might interfere with the free and untrammeled carrying out of the purposes of government.

The only case that we have been able to find where locks and dams were defined as needful buildings is that of United States vs. Tucker, 122 Fed. 518, decided in 1903. The question arose on a demurrer to an indictment charging the defendant with the crime of murder in

> "what is known as Lock Number Three, on Green river, and upon a certain tract of land upon which said lock was then and there and now is located, which land and which lock were then and there and now are the property of and owned by the United States, and upon which land and in and at which place thereon the United States then conducted and carried on and now conducts and car-

ries on a part of its public business, to-wit, the providing of locks and dams on said Green river for the safe and useful navigation thereof, and which land and lock had, before said 13th day of May, 1900, been duly purchased by and ceded to the United States with the consent of the Legislature of the state of Kentucky, and which were then and there and which are now under and within the exclusive jurisdiction of the United States, as well by the said purchase and the consent of the Legislature of the state of Kentucky which was given thereto as by an express act of said Legislature in that behalf and ceding said jurisdiction, to-wit, an act entitled 'An act to grant the consent of the state of Kentucky to the acquisition by the United States of certain lands within the commonwealth bordering on Green and Barren rivers for certain purposes,' and which act was approved February 20th, 1886 (1 Sess. Acts 1885-86, p. 11, c. 69), by the Governor of the said state." . . .

This matter coming up on a demurrer, all of the facts well pleaded were admitted, and the Court therefore had before it the uncontradicted facts that the United States purchased the place in question with the consent of the legislature; that the legislature had, in express terms, ceded to the United States jurisdiction over this particular place and that the United States conducted and carried on a part of its public business, to-wit: the providing of locks and dams on the Green river for the safe and useful navigation thereof. All of this, coupled with the fact that the federal government was making the claim of exclusive jurisdiction, no doubt influenced the Court in holding that this

place was a "needful building." Although we feel that the United States obtained exclusive jurisdiction by virtue of the special legislative act ceding exclusive jurisdiction to it over this particular place, still we have no particular criticism of the holding that this, under the admitted facts, was a "needful building." The act occurred on lock No. 3, a completed structure, then being operated by the United States for the safe and useful navigation of the Green river, which was a governmental function. The primary purpose of the construction and operation of these particular locks and dams was to aid navigation. In the case at bar, we have a contractor who is excavating for the construction of a dam, the main purpose of which will be to furnish power and provide water for the irrigation of arid land. The land in question was not acquired for one of the purposes within the constitutional provision and therefore neither Rule One nor Two can apply.

Nor was this land acquired by the United States for a purpose not within Clause 17, but where jurisdiction was ceded by an independent and special act of cession by the legislature. That rule is very well explained in United States vs. Tucker, supra, at Page 520, as follows:

> "Where there is a 'purchase' of property with the consent of the state legislature, exclusive jurisdiction follows and attaches by virtue of the constitutional provision itself, while in the case of express cession of jurisdiction to the United States by a legislative enactment for that purpose the jurisdiction of the United States over the place is derived from such legislative act, and not necessarily from the constitutional provision per se."

See also syllabus to In Re Kelley, 71 Fed. 545, as follows:

> "The purchase of lands in a state by the general government, with legislative consent, does not, ipso facto, confer upon the federal government exclusive jurisdiction, unless the purchase is for a fort or for some other purpose distinctly named in article 1, section 8, of the constitution; and in order that exclusive jurisdiction may be acquired over land taken for any other purpose, the act providing therefore and calling for the consent must unequivocally declare that exclusive jurisdiction is intended and necessary, or such necessity must be manifest from the purpose of the act."

There are two methods, therefore, by which exclusive jurisdiction can be acquired by the federal government; one by the purchase with the consent of the legislature for one of the purposes enumerated in the constitution, and the other by a special act of the legislature, ceding jurisdiction over the particular area involved. Jurisdiction attaches in the first by virtue of the constitutional provision itself, while in the second, jurisdiction is derived from the legislative act. No such special legislation ceding jurisdiction over the area involved was enacted in this case.

Appellant relies upon Section 8108, Remington's Compiled Statutes because it includes the following:

> ". . . for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, . . ."

It should be borne in mind, however, that said act provides:

> "the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided."

Any consent given in compliance with the constitutional provisions could only be for one of the purposes enumerated. The state could not enlarge upon the powers granted to congress by the federal constitution by the enactment of any general statutes of cession to comply with the terms of the constitution. Furthermore, general statutes of cession are strictly construed.

Six Companies Inc., vs. DeVinney, 2 Fed. Supp. 693.

It can clearly be seen that the legislature in 1891 had no intention of ceding jurisdiction of this particular area for the construction of the Grand Coulee dam as a part of the Columbia Basin Project. If the federal government should want exclusive jurisdiction over this area, and it should be borne in mind that there has been absolutely no want, desire or intention on the part of the federal government to exercise such exclusive jurisdiction, but if such were wanted, then the legislature could, by a special act, make an express cession of jurisdiction over this particular area to the federal government, and it would then have exclusive jurisdiction, not because of the constitutional provision, but because of the special act of cession. Rule No. Three would therefore not apply.

It is true that an individual may raise this ques-

tion of jurisdiction and that it does not necessarily have to be raised by the federal government. However, it must be shown that the federal government, by some affirmative act, claims jurisdiction. The record in this case is absolutely void of any such attempt. On the contrary, every act which the federal government has done in connection with this project has been inconsistent with any claim of exclusive jurisdiction. In its contract with the State of Washington it recognized and protected the rights of the State throughout. In its contracts with the appellants herein for the construction of the dam it provided that preference should be given to citizens who are residents of the county and state in which the work was to be performed; that they should furnish compensation insurance in compliance with the laws of the state wherein the work was to be done and should comply with all applicable provisions of federal, state and municipal safety laws. The contract further provided that the contractors should make all necessary arrangements with the proper state and county authorities for school facilities, and that police protection for the contractor's camp and the area involved in and surrounding the contractor's work would be furnished by the Washington State Patrol in cooperation with the federal government. In addition to this the Bureau of Reclamation recognized the jurisdiction of the county superintendent of schools regarding the formation of a school district for the government townsite. From the foregoing it can be plainly seen that the federal government has never at any time claimed exclusive jurisdiction but has always recognized the jurisdiction of the state and its various subdivisions. As a matter of fact, until the commencement of this action, appellant

Silas Mason Company, Inc. apparently recognized the jurisdiction of the state in this area because its attorney, located at the contractor's camp, was appointed justice of the peace in Okanogan county and all of the policemen employed by it were appointed as deputy sheriffs of Okanogan County.

In Stockton vs. Baltimore & N. Y. R. Co., 32 Fed. 9, the State of New Jersey sought to enjoin the defendants from erecting a bridge upon the lands of the State situate on the shore on the ground that the federal government had not obtained title to the land by condemnation. It was claimed that the only constitutional method by which the federal government could obtain the possession and use of lands within a state was in conformity with the constitutional provision under consideration herein. Mr. Justice Bradley, a member of the United States Supreme Court, then sitting as a circuit judge, held on Page 18:

> "The argument, however, is directed to the acquisition of territory, with exclusive jurisdiction over the same, and is entirely sound in that regard. But it does not touch the question as to the power of the United States to acquire the mere use of land without exclusive jurisdiction therein. Nearly all the powers of government are exercised over territory in which the United States and the several states have concurrent jurisdiction. It is only in exceptional cases that the United States desires to have exclusive jurisdiction, and a consequent cession of territory. It is very true that the consent of the state legislature is required in order to give the United States this exclusive jurisdiction. But that is all. It is not required

when exclusive jurisdiction is not sought. On the contrary, the government, if it sees fit, may condemn land for its purpose without the consent of the state."

This is not one of those exceptional cases where the federal government desires to have exclusive jurisdiction. It has, and will continue to acquire this land by either purchase or condemnation. The land, and the dam which is being constructed upon it, are not such as would necessarily require absolute and exclusive jurisdiction in the United States government. No such exclusive jurisdiction has been asked for by the federal government and none has been given by the State of Washington. Furthermore, the constitution does not say that congress *shall exercise* exclusive legislation. It says that the congress shall have *power to exercise* exclusive legislation.

We must therefore come to the conclusion that the land acquired for this project would come within Rule Four as enumerated above. It was acquired by the United States for a purpose not within Clause 17 of the federal constitution and there has been no express cession of this particular area by any special act of the legislature. The government therefore holds the land just as any ordinary proprietor. It, the land, being the property of the federal government, may not be taxed by the State. This is because any property owned by the government is exempt from taxation. But when land is held by the government in its proprietary capacity only, it does not exercise exclusive jurisdiction over that land. That land is therefore under the jurisdiction of the state. It is the duty of the state to afford protection to the persons, property

and businesses residing within said area and the state therefore has a right to tax said persons, property and businesses.

This is further borne out by the fact that this dam is being constructed by the Reclamation Department rather than by the War Department. Appellant continually insists that the primary purpose of this project is the improvement of navigation. The record shows that its primary purpose is to furnish power and to furnish water for arid lands. The Columbia Basin Commission was organized by the State of Washington for the purpose of securing the development of the Columbia Basin Project, which is a project to reclaim approximately 1,200,000 acres of arid land. The Grand Coulee dam is being constructed for the purpose of furnishing power and furnishing of water for these arid lands. It should be remembered that after the Silas Mason Company had commenced work on their contract the specifications of the contract were changed to lower and widen the dam, thus constructing an enormous base which will sustain the high dam which it is contemplated will ultimately be erected and provide for the irrigation of this large area. The aid to navigation is merely incidental. The facts here are clearly distinguishable from the facts in State vs. Tucker, supra.

In Twin Falls Canal Company vs. Foote, 192 Fed. 583, proceeding under the authority of the Act of Congress of June 17, 1902, 32 Fed. Stat., 388, commonly known as the "Reclamation Act," the same act under which the Secretary of the Interior is proceeding in this instance, the Secretary of the Interior had caused to be constructed, and was maintaining a canal system

diverting water from the Snake River. The plaintiff, a corporation operating in that territory, sought an adjudication of its rights, and the Court held, at page 594:

> "The storage of water for irrigation purposes or the reclamation of arid lands is not, accurately speaking, a governmental function, and is not "a necessary part of civil government in the same sense in which the protection of life, liberty and property, the defense of the government against insurrection and foreign invasion, and the administration of public justice, are." The government, being possessed of large tracts of arid land, which without irrigation are practically worthless, in pursuance of a wise policy, as we think, is, under the reclamation act, engaged in reclaiming them, to the end that they may become marketable and ultimately fruitful.
>
> "(1) In prosecuting such an enterprise, however, it is not primarily performing a governmental, or, strictly speaking, even a public function, but is promoting its proprietary interests. Such advantage as arises therefrom to the people at large is material and not governmental, and is only such as might indirectly accrue to the public from the reclamation of an equal amount of land through private enterprise."

CONCLUSION

In the case at bar this land was not acquired by the United States for one of the purposes within Clause 17, Section 8, Article 1 of the federal constitution. No express cession of jurisdiction over this area was given to the federal government by the State of

Washington by any special legislative enactment for that purpose. The land and the dam being erected thereon are not now and will not in the future be such as would necessarily require absolute and exclusive jurisdiction in the federal government. The project is primarily in the aid of reclamation and the aid to navigation is merely incidental thereto. The federal government holds this land simply in the capacity of an ordinary proprietor. In building the Grand Coulee dam and promoting the Columbia Basin Project the federal government is not primarily performing a governmental, or, strictly speaking, even a public function. It is merely promoting its proprietary interests. Such advantage as may arise to the people at large from the building of this project is material and not governmental and is only such as might indirectly accrue to the public from the reclamation of an equal amount of land through private enterprise. It never has attempted nor it is now attempting to exercise exclusive jurisdiction over this area. It recognizes the jurisdiction of the State of Washington and there has never been any conflict between the two sovereignties nor any interference by either with the activities of the other.

It is therefore submitted that the judgment should be affirmed.

Respectfully submitted,
E. P. Donnelly,
Counsel for Appellees
E. W. Schwellenbach,
Amicus Curiae.

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The Supreme Court of the United States

October Term 1936

No. [redacted] 8

DAVID H. RYAN,

Appellant,

vs.

THE STATE OF WASHINGTON, et al.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Motion of Mason-Walsh-Atkinson-Kier Company for leave to file Brief as Amicus Curiae, and Brief of Amicus Curiae

W. G. GRAVES,
ARNOLD L. GRAVES,
Counsel for Mason-Walsh-Atkinson-Kier Company as Amicus Curiae.

GRAVES, KIZER & GRAVES,
Of Counsel.

EMPIRE PRINTING CO., SPOKANE

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DAVID H. RYAN,

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W. G. GRAVES,
ARNOLD L. GRAVES,
Counsel for Mason-Walsh-Atkinson-Kier Company as Amicus Curiae.

GRAVES, KIZER & GRAVES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

October Term, 1936

No. 774

DAVID H. RYAN,

Appellant,

v.

THE STATE OF WASHINGTON, et al.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Mason-Walsh-Atkinson-Kier Company respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

There has been filed in this cause a stipulation by counsel for the respective parties that the accompanying brief may be so filed.

W. G. GRAVES,
ARNOLD L. GRAVES,
Counsel for Mason-Walsh-Atkinson-Kier Company as Amicus Curiae.

GRAVES, KIZER & GRAVES,
Of Counsel.

STATEMENT

The appellants in Silas Mason Company et al v. Tax Commission of the State of Washington et al, number 773 upon the docket of this court, assign error upon the question presented in this case. There, as here, it is urged that the cession by the State of Washington of jurisdiction to the United States precludes the levy by the State of its occupation tax in respect of an occupation carried on solely in ceded territory. As noted in the brief in that case the cession of jurisdiction to tax was pleaded as a ground of invalidity of the tax. The error of the trial court in this respect was assigned upon appeal to the Supreme Court of the State. By agreement of the parties and with the consent of the court, the question, common to both cases, of interference by the State with the United States was argued and presented in the Silas Mason case while the question, likewise common to both of the cases, of the effect of the cession of jurisdiction to the United States was presented in the Ryan cases. Since this procedure simplifies the presentation of the question in the cases, the appellants in the Silas Mason Company case adopt the argument to be made in this case as applying to their assignment of error based on the cession of jurisdiction. For this reason counsel for all the parties in both cases have stipulated that this brief may be filed in this cause to present the views of the appellants in the Silas Mason case.

The United States government is engaged in constructing the Grand Coulee Dam across the Columbia

River in the State of Washington. The appellants in the two Ryan cases and the appellants in the Silas Mason case are performing portions of the work under contracts with the United States. The details of the various contracts are set forth in Exhibit "A" in the two Ryan cases and in Exhibits "A" and "B" in the Silas Mason cases. An inspection of the contract and specifications will disclose that the United States prescribes in minute detail every step in the performance of the contract. The United States furnishes to the contractor the greater portion of the materials to be used, including the structural steel, the cement and even the sand and gravel. The contractors' function is the supply of labor. The dam is to be built according to the government's plans and specifications. It is to be built under the supervision of the officers of the government and is in its every detail subject to their inspection and approval. Purchases of every sort by the contractors are subject to the government's approval. The government specifies rules for the hiring of labor, who shall be hired and the wages that shall be paid them. It specifies the hours that men shall work. It specifies in detail the place where the contractors' camp shall be built, how the men shall be housed and how the buildings shall be constructed. It specifies concerning the water supply for the camp, for its fire protection, for its sewer and sanitation, for concessions and laws in the camp-site, what charges shall be made to the men, for schools, for police protection, and in short it regulates in every detail and every hour what the contractor shall do and how it shall do it.

Exhibit "C" in the Silas Mason case is a map showing the land at the site of the Grand Coulee Dam acquired by the United States government. Accompanying the map is a letter from the United States Engineer in charge of the construction explaining the map and stating the use to which the lands are put.

The record (R. 76, 104, 105) contains the stipulation that the United States government has acquired title to the lands shown on the map and that all of the work done by the appellants in all of these cases is done solely upon land, the title to which has been acquired by the United States Government. Title to the land in private ownership was acquired either by purchase or by condemnation. Jurisdiction over the land so acquired has been ceded to the United States by the State of Washington by statute.

> § 8108, Remington's Revised Statutes of Washington.

Congress has authorized the construction of the Grand Coulee Dam by the Rivers and Harbors Bill of the 74th Congress.

The Columbia is the second largest river in North America, exceeded in size only by the Mississippi. In its lower reaches it carries the ocean borne traffic of the world. The navigation of its upper reaches is rendered difficult in places by shoals and rapids. The river, however, throughout its length is navigable in fact as in law. At the point of construction of the Grand Coulee Dam the river has been stipulated to be navigable. (R. 105.)

The construction of the Grand Coulee Dam will create a quiet water pool extending from the middle of the State of Washington to the Canadian boundary, a distance of over 150 miles.

ARGUMENT

A. CESSION OF JURISDICTION TO UNITED STATES.

The cession of jurisdiction by the State of Washington with the sole reservation of concurrent jurisdiction for the service of civil and criminal process precludes the levy by the State of taxes upon persons or property within the territory ceded. It is as though this territory had ceased to be a part of the State of Washington. This is recognized in Concessions Company v. Morris, 109 Wash. 46. We quote the language of *the court at page 51:*

> "Under our law, Rem. Code, § 9101, only personal property *in* the state of Washington can be listed for taxation, and the question, therefore, must be answered by a determination of whether personal property situated upon this military reservation is *in* the state of Washington. It seems to us that the answer to this is clear, and that such property is *without* the state in both a jurisdictional and territorial sense, for, as we have seen by the constitution of the United States, and the act of the legislature of this state, both the military reservation itself and the jurisdiction and legislation over it have been granted to the United States, and thereby there has been created an independent sovereignty the territory of which is surrounded by the state of Washington, but over which the state of Washington has no jurisdic-

> tion. A territory has been created which resembles that of the District of Columbia, the only reservation being that the state of Washington can serve civil and criminal process therein on actions arising outside the reservation."

The cession of jurisdiction by Remington's Revised Statutes, § 8108, is as clear as anything can be. We set forth the pertinent language of the statute, eliminating unnecessary verbiage:

> "The consent of the state of Washington be and the same is hereby given to the acquisition * * * by the United States of America * * for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers * * of this state, * *; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired * * for any or either of the purposes before mentioned * *."

No more definite, precise and exact cession of jurisdiction can well be imagined.

That the State of Washington, acting through its legislature, has power to make such a cession to the Federal government is likewise established by the same case. We quote from page 67:

> "As was decided in Fort Leavenworth R. v. Lowe, above, the legislatures of the various states have *power to cede* sovereignty to the Federal government of any territory within the state, * *."

As the statement above indicates the decision in Fort Leavenworth Railroad v. Lowe, 114 U. S. 525, is regarded as settling this question. We quote from pages 540 and 541:

"We are here met with the objection that the Legislature of a State has no power to cede away her jurisdiction and legislative power over any portion of her territory, * * *.

"In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the State, they are not those of a different country; and the two, the State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. * * * Such cession is really as much for the benefit of the State as it is for the benefit of the United States. * * *."

When it is established that the Legislature of the State of Washington has power to cede jurisdiction over territory lying within the State of Washington to the United States government, and when it is established that it has ceded such jurisdiction the conclusion follows as a logical necessity that the State has parted with the power to tax persons or property within such territory. Concessions Company v. Morris, 109 Wash. 46, Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, Arlington Hotel Company v. Fant, 278 U. S. 439, Surplus Trading Company v. Cook, 281 U. S. 647, Standard Oil Co. v. California, 291 U. S. 242.

B. PURCHASE BY UNITED STATES WITH CONSENT OF STATE.

The intention of the Legislature to cede exclusive jurisdiction to the United States over all land ac-

quired by it for the purpose of such projects seems beyond question. If so, the case is disposed of. On the other hand, if the statute, notwithstanding its explicit language, be construed as not ceding jurisdiction, nevertheless exclusive jurisdiction has been acquired by the United States. A cession of jurisdiction by the State, of course, is one way in which the United States can acquire exclusive jurisdiction but it is not the only one. Another is purchase with the consent of the State.

By Article I, Section 8, Clause 17 of the Constitution of the United States, Congress is given power—

> "To exercise exclusive legislation in all cases whatsoever, over such district * * * and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

The effect of this clause of the Constitution has never been doubted. It is stated in Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 532:

> "When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has been the uniform opin-

ion of Federal and State tribunals, and of the Attorneys General."

The requisites of exclusive jurisdiction in the United States then are:

1. Purchase of land by the United States.

2. Consent to such purchase by the State Legislature.

3. A purpose within the meaning of the clause.

As to the first requisite it was stipulated (R. 76, 88, 103) that title to all of the land upon which the work of the contractors was performed had been purchased by the United States.

Next, the consent to such purchase by the Legislature of Washington. Remington's Revised Statutes, § 8108:

> "The consent of the state of Washington be and the same is hereby given to the acquisition * * * by the United States of America * * * for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers * * * of this state, * * *."

Third, the purpose of the United States in undertaking the project. As stated in the Act of Congress the purpose is the improvement of navigation of the Columbia River by means of a dam and the subsidiary power plants and other structures. That such a project for such a purpose is within the constitutional power of Congress to authorize is established by Arizona v. California, 283 U. S. 423; Ashwander v. Tennessee Valley Authority, 297 U. S. 288; New York ex rel. Rogers v.

Graves, 81 Law Ed. Adv. Op. No. 5, p. 202, and many another case which it is unnecessary to cite. Likewise it is established by a long line of authorities, that such a project is within the meaning of clause 17 of the Constitution.

From the earliest times the courts have given to this clause of the Constitution a broad and liberal construction and have never narrowed its application by strict or inflexible rules. The courts have construed the language of clause 17 "and other needful buildings" as embracing all structures and places necessary for carrying on the governmental as distinguished from the proprietary business of the government.

In United States v. Tucker, 122 Fed. 518, the court expresses the thought as follows:

> "While there might possibly be some difficulty, if the question was res integra, as to the strictly proper construction and applicability to the case of locks and dams of the words 'for the erection of forts, magazines, arsenals, dock yards, and other needful buildings' used in the clause of the Constitution above quoted, the cases seem to leave no doubt that the broadest construction has been wisely put upon that language—one which makes it cover all structures and all places necessary for carrying on the business of the national government."

Many structures which by no possibility can be comprehended within the phrase "forts, magazines, arsenals, dock-yards" or can be considered as of like kind have been held to be within the language "and other needful buildings." Thus:

Post Offices and Federal Court Houses, State ex rel. Jones v. Mack (Nev.), 47 Pac. 763.

Soldiers Homes, People v. Mouse, (Cal.), 265 Pac. 944.

Indian Schools, United States v. Wurtzbarger, 276 Fed. 753.

Customs House, Sharon v. Hill, 24 Fed. 726.

Federal Penitentiary, Steele v. Halligan, 229 Fed. 1011.

Military Cemetery, Wills v. State, 50 Tenn. 141.

Locks and Dams, United States v. Tucker, 122 Fed. 518.

National Parks, Arlington Hotel Co. v. Fant, 278 U. S. 439.

The Arlington Hotel Company v. Fant case, supra, deals with the Hot Springs National Park. We call the court's attention to the fact that Congress has asserted the exclusive jurisdiction of the United States over Yellowstone National Park, U. S. C. A., Title 16, § 24, Act of May 7, 1894, Chapter 72, § 1, 28 Stat. 73; Sequoia, Yosemite and General Grant National Parks, U. S. C. A., Title 16, § 57, Act of June 2, 1920, Chapter 218, § 1, 41 Stat. 731; Mount Rainier National Park, U. S. C. A., Title 16, § 95, Act of June 30, 1916, Chapter 197, § 1, 39 Stat. 243; Crater Lake National Park, U. S. C. A., Title 16, § 124, Act of August 21, 1916, Chapter 368, § 1, 39 Stat. 521.

C. GRAND COULEE DAM PROJECT WITHIN CONSTITUTIONAL POWER OF CONGRESS.

Apparently the Supreme Court of Washington does not question either the rule that a cession of jurisdiction by the State vests exclusive jurisdiction in the United States or the rule that purchase of land with the consent of the State Legislature vests exclusive jurisdiction in the United States. The following excerpts appear to give the court's reasons for its decision (R. 46):

> "The point that we make and stress here, and upon which we rest our ultimate conclusion herein, is that, while the statute conferred consent upon the United States to acquire land within the territory of the state, the state's power to cede jurisdiction is limited, by the statute, to those instances where it clearly appears that the land is to be used by the United States for a constitutional or governmental purpose."

(R. 50):

> "The facts, taken as a whole, argue conclusively, in our opinion, that the state never intended to cede, and the United States never intended to take, exclusive jurisdiction over the project."

The basis of the court's opinion then is its conclusion that the Grand Coulee Dam project is beyond the scope of the governmental functions of the United States and in excess of its power under the Constitution because the purpose of the United States in undertaking the work is not *"a constitutional or governmental purpose."* This finding is not made from a consideration of the Act of Congress authorizing the

project—but from certain clauses in contracts relating to preliminary surveys and clauses in the specifications drawn up by engineers employed by the bureau of reclamation. In other words, the declaration by Congress "For the purpose of * * * improving navigation * * * the project known as * * * 'Grand Coulee Dam' on the Columbia River are hereby authorized and adopted, * * *" is not proof of the purpose of the United States, but a clause in a contract relating to a detail of the work inserted to insure compensation to injured workmen, is proof of the fact that the purpose of the project as a whole is beyond the scope of the Constitutional powers of the Federal government.

As a matter of logic this reasoning is faulty. Since Congress alone has power to authorize the Grand Coulee Dam project (United States v. Arizona, 295 U. S. 174) it follows that the purpose for which the project is authorized is the purpose of Congress. The Constitution gives to Congress the power to regulate commerce. Without an Act of Congress no officer of the United States, not even the President, has power to authorize the construction of a dam in navigable waters. United States v. Arizona, supra. It follows that whatever any official of the United States or the State of Washington may have said or done, or may have omitted to say or do, is irrelevant to the question of whether the United States has undertaken the project for "a constitutional or governmental purpose." An official may exceed his authority, may mistake the purpose of Congress, or may misconstrue the

Act of Congress, but his error cannot in logic control the court's decision upon the question whether a project undertaken pursuant to authorization by an Act of Congress is within the constitutional power of Congress to regulate commerce under the commerce clause of the Constitution.

The Act of Congress authorizing the Boulder Canyon Dam in the Colorado River declares the purpose of the project to be river regulation, improvement of navigation, flood control, irrigation, domestic use and power. In other words, the declaration of the purpose of Congress in that Act is identical with the declaration of Congress' purpose in the Act authorizing the Grand Coulee Dam project.

The Attorney General of Arizona urged this court in Arizona v. California, 283 U. S. 423, that the improvement of navigation, notwithstanding the terms of the Act, was not intended. We quote his argument as it appears at pages 444-445 of the official report:

> "Instead of being designed to improve navigation, the compact was drawn with the unmistakable intention of dedicating the river to uses inconsistent with navigation. That is not a mere speculation, but appears from the express language of the compact. * * *
>
> "The Act specifies, definitely and concretely, only two uses to which the project shall be put. One is the storage and sale of water. The other is the generation and sale of electrical power. Both uses would be hurtful rather than helpful to navigation, if there were any navigation to be hurt or helped.
>
> "It requires no argument to show that the navigation of a river, which has become non-nav-

igable from lack of water, cannot be improved by taking more water out of it. * * *"

In spite of the cogency of this argument this court upheld the Boulder Canyon Project Act as a valid exercise of the governmental and constitutional functions of the United States because of the declaration by Congress in the Act of its purpose to improve navigation. (pp. 455-456)

> "Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this Court may not enquire. (Citing cases.) The Act declares that the authority to construct the dam and reservoir is conferred, among other things, for the purpose of 'improving navigation and regulating the flow of the river.' As the river is navigable and the means which the Act provides are not unrelated to the control of navigation (citing cases), the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary is not for this Court to determine. (Citing many cases.) And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power. (Citing cases.)"

In Ashwander v. Valley Authority, 297 U. S. 288, the power of Congress to construct the Wilson Dam and Power Plant across the Tennessee River and to sell the electric energy generated was questioned. This court remarks (p. 329):

> "While, in its present condition, the Tennessee River is not adequately improved for commercial navigation, and traffic is small, we are not at lib-

> erty to conclude either that the river is not susceptible of development as an important waterway, or that Congress has not undertaken that development, or that the construction of the Wilson Dam was not an appropriate means to accomplish a legitimate end.
>
> "The Wilson Dam and its power plant must be taken to have been constructed in the exercise of the constitutional functions of the Federal Government."

In Arlington Hotel Company v. Fant, 278 U. S. 439, it appeared that a portion of the land was leased to a private hotel company. The attorneys for the plaintiff in error made a similar argument to this court. At page 441 of the report counsel say:

> "The site of the Arlington Hotel has never been devoted to or used for any governmental purpose of any character. It has always been used by the United States solely in its capacity of owner and landlord, for profit, and the United States cannot, in that capacity, acquire or accept jurisdiction of any character over it, * * *."

Answering this contention Mr. Chief Justice Taft remarks (p. 455):

> "* * * Nor is the constitutional basis for acquisition any less effective because the springs thus kept safely available for the Federal purpose do in the abundance of their flow also supply water sufficient to furnish aid to the indigent and to those of the public of the United States who are able to pay for hotel accommodation on the little park surrounding the hospital and the springs. * * *"

In the case of New York ex rel. Rogers v. Graves, decided by this court January 4, 1937, reported in

Law Edition Advance Opinions, Volume 81, No. 5, page 202, the relator claimed his salary as general counsel for the Panama Railroad Company as exempt from the state income tax of New York. The court first determines that the creation, management and operation of the Panama Canal are proper governmental functions, and, secondly, that the railroad was built to aid in this purpose. The court goes on to remark (p. 206):

> "We attach no importance to the fact that the railroad company has utilized both its ships and railroad to carry private freight and passengers. The record shows that this is done to a limited extent compared with the government business; and that it is only incidental to the governmental operations. The primary purpose of the enterprise being legitimately governmental, its incidental use for private purposes affords no ground for objection. * * *
>
> "It is suggested that the dairy, hotels, and other enterprises, built and maintained by the company, are not governmental instrumentalities. Even if we accept that conclusion—which, in view of their use for the personnel of the railroad and canal, we are far from doing—it would not alter the fact that the railroad itself, in connection with the canal, is a Federal instrumentality."

Equally erroneous is the conclusion that the State of Washington did not intend to cede exclusive jurisdiction to the United States. This conclusion obviously cannot be based upon a construction of the statute of the State of Washington by which the Legislature cedes jurisdiction. Remington's Revised Statutes of Washington, § 8108. The words "and

the jurisdiction of this state is hereby ceded to the United States of America" obviously show an intention of the Legislature to cede. The conclusion of the court that a cession was not intended therefore can be based only upon the proposition that the power of the Legislature to cede jurisdiction is limited to projects within the constitutional power of Congress to authorize. We place side by side the purposes of the Boulder Canyon Dam as quoted at page 456 of the opinion of this court in Arizona v. California, supra, and the purposes of the Grand Coulee Dam taken from the Rivers and Harbors Bill of the 74th Congress, thus:

Boulder Canyon Dam	*Grand Coulee Dam*
River regulation	Controlling floods
Improvement of navigation	Improving navigation
Flood control	Regulating the flow of the streams of the United States
Irrigation	Storage and delivery of stored waters
Domestic use	Reclamation of public lands and Indian reservations
Satisfaction of present perfected rights	Other beneficial uses
For power	For the generation of electric energy as a means of financially aiding and assisting such undertaking

Can it for one instant be doubted that the conclusion of this court concerning the Boulder Canyon Dam "the erection and maintenance of such a dam and reservoir are clearly within the powers conferred

upon Congress" applies in all its force to the Grand Coulee Dam project?

Appellees make the further contention that a part of the dam will rest upon the bed of the Columbia River, title to which is vested in the State of Washington. The answer to this contention has often been given by this court. It is, that whatever ownership to the bed of navigable streams may vest in the State such ownership is subordinate to the paramount right of the Federal government to assert its title to so much of the stream bed as is necessary to the improvement of navigation.

In Gilman v. Philadelphia, 3 Wall. 713, 714, this court said:

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. * * *"

and in Gibson v. United States, 166 U. S. 269, 271:

> "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution."

In United States v. Chandler-Dunbar Co., 229 U. S. 53, a condemnation suit by the United States against the owners of the bed of a navigable stream who had acquired title thereto from the State of Michigan, the court remarks (p. 62):

> "It [the ownership of the stream bed] is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution, are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation."

Arizona v. California, 283 U. S. 423, is an action for an injunction enjoining the erection of the Boulder Dam in the Colorado River brought by the State of Arizona against the Secretary of the Interior of the United States and the States of California, etc. It appeared that a statute of Arizona required the approval of the State Engineer of the plan of dams erected by the United States government. The court held that the United States has power to construct a dam across a navigable river for the purpose of improving navigation and need not first obtain ap-

proval of its plans by the State in which the dam is to be located even though this be expressly required by a statute of such State. On page 451 the court says:

> "The United States may perform its functions without conforming to the police regulations of a State. (Citing cases.) If Congress has power to authorize the construction of the dam and reservoir, Wilbur [Secretary of the Interior] is under no obligation to submit the plans and specifications to the State Engineer for approval. And the Federal Government has the power to create this obstruction in the river for the purpose of improving navigation if the Colorado River is navigable. (Citing cases.)"

In Ashwander v. Tennessee Valley Authority, 297 U. S. 288, the power of the United States to dispose of electric energy generated at the Wilson Dam in the Tennessee River was challenged. This court first found that the erection of a dam in a navigable river was within the constitutional power of Congress. At page 330 the court says:

> "* * * The Government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electric energy, and the water power, the right to convert it into electric energy, and the electric energy thus produced, constitute property belonging to the United States. * * *"

ADDENDUM

While fully conceding (R. 76) that the Ryan contracts were performed wholly upon lands acquired by

the United States prior to the commencement of the work, in the Silas Mason case appellees remark, somewhat casually, that Section 36 (upon Exhibit C) is school land and that the title to it is in the State of Washington. Neither the dam itself, nor any of the structures appurtenant to it, nor any of the works of the contractors are upon this land or directly contiguous to it. Neither is the land part of the contractors' camp. In fact, it is across the river opposite to the contractors' camp. For these reasons the Supreme Court of the State of Washington does not even notice this contention of appellees in its opinion. A reference to Exhibit C, the map and the letter accompanying it, and pages 104, 105 and 107, of the transcript of the record (Silas Mason case) show that this land is known as the "Engineers' Camp" to distinguish it from the contractors' camp (Mason City). It has been reserved pursuant to Remington's Revised Statutes, §§ 7410, 7412, as the site of residences for the engineers of the United States Bureau of Reclamation. (R. 104, 105.) This reservation by the State for the benefit of the United States will, if it be material, "ripen into a grant from the State to the United States upon completion of the project." For the purposes of this case the question of title is irrelevant and immaterial because the land is neither used nor useful in connection with any work of the contractors in either of the present cases.

CONCLUSION

It is respectfully submitted that the land acquired by the United States government for the purpose of the Grand Coulee Dam project is both by express cession by the State and by purchase by the United States with the consent of the State removed from the jurisdiction of the State of Washington and is within the exclusive jurisdiction of the United States. It follows that the State of Washington is without power to levy any tax upon an occupation conducted exclusively upon such territory.

Respectfully submitted,

W. G. GRAVES,
ARNOLD L. GRAVES,
Counsel for Amicus Curiae.

GRAVES, KIZER & GRAVES,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

DAVID H. RYAN, Appellant,
vs.
THE STATE OF WASHINGTON, et al., Appellees.
No. 8

REPLY BRIEF OF AMICUS CURIAE

E. P. DONNELLY,
Counsel for Appellees.
E. W. SCHWELLENBACH,
Of Counsel.

Post Office Address:
Ephrata, Washington.

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E. W. SCHWELLENBACH,
Of Counsel.

Post Office Address:
Ephrata, Washington.

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ARGUMENT

We are appreciative of the fact that the Attorney General agreed with us that acceptance by the United States is necessary to a transfer of exclusive jurisdiction from the state by either consent to the purchase of lands for one of the purposes enumerated in the constitution, or by a direct act of cession. The constitution provides that the congress shall have power to exercise exclusive legislation. And until that power is exercised, no jurisdiction attaches.

Article One, Section Eight, Clause Two provides that:

> "The Congress shall have power . . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

In Gilman vs. Philadelphia, 70 U. S. 96, which was an action to enjoin the defendants from erecting a bridge without a draw over the Schuylkill river, it was held that commerce includes navigation, but that the states may exercise concurrent or independent power in all cases but three:

1. Where the power is lodged exclusively in the Federal Constitution.

2. Where it is given to the United States and prohibited to the States.

3. Where, from the nature and subjects of the power, it must necessarily be exercised by the National Government exclusively.

The court then concludes:

> "Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the State is plenary, and its exercise in good faith cannot be made the subject of review by this court."

We wish to respectfully submit, however, that we do not agree with the Attorney General in his contention that the enactment of Section 8108, Remington's Compiled Statutes, resulted in the consent of the State of Washington to the exclusive jurisdiction of the federal government over the area involved under clause seventeen and also resulted in an act of cession of exclusive jurisdiction over this area by the state to the federal government. This would mean that the state has absolutely given up any right to exercise any kind of jurisdiction over this area and that the federal government could, at any time in the future, without any further action by the state, take exclusive jurisdiction.

It should be noted that said Section 8108 commences as follows:

> "The consent of the State of Washington be and the same is hereby given, etc."

After listing the various objects for which this consent is given, said act continues:

> "The consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided."

Clearly the purpose of this act was to comply with the

provisions of clause seventeen. Said act then continues:

> "And the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned."

That provision was placed in the act merely for the purpose of reaffirming the consent given to comply with the provisions of clause seventeen by ceding to the federal government exclusive jurisdiction over all lands acquired under the provisions of said clause. In other words, this is clearly a consent statute and not a cession statute. The Supreme Court of the State of Washington has interpreted this as a consent statute. State ex rel Calvert vs. Russell, 33 Wash. 380, 390.

It is true that said Section 8108 includes:

> "For the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon."

Because said act provided, however, that the consent was given in accordance with clause seventeen, the legislature was limited in its consent to the particular

purposes enumerated in clause seventeen, to-wit:

> "For the erection of forts, magazines, arsenals, dockyards and other needful buildings."

The legislature of the State of Washington had absolutely no right, under this consent statute, to grant to the congress powers which were not given to it under the constitution and any reference to locks, dams, piers, breakwaters, keepers' dwellings, etc. is merely surplusage.

We agree with the Attorney General that a transfer of jurisdiction may be made either by a purchase with the consent of the legislature for one of the purposes enumerated in the constitution or by a special act of the legislature ceding jurisdiction over the particular area involved. Jurisdiction attaches in the first by virtue of the constitutional provision itself, while in the second, jurisdiction is derived from the legislative act. The latter method, however, can only be effected by a special act of the legislature, ceding jurisdiction over the particular area involved. This is clearly pointed out in the syllabus to In Re Kelley, 71 Fed. 545, as follows:

> "The purchase of lands in a state by the general government, with legislative consent, does not, ipso facto, confer upon the federal government exclusive jurisdiction, unless the purchase is for a fort or for some other purpose distinctly named in

> article 1, section 8, of the constitution; and in order that exclusive jurisdiction may be acquired over land taken for any other purpose, the act providing therefore and calling for the consent must unequivocally declare that exclusive jurisdiction is intended and necessary, or such necessity must be manifest from the purpose of the act."

No such act of cession was enacted by the legislature of the State of Washington covering this particular area.

As a matter of fact, we have been unable to find a single case in which the courts have found exclusive jurisdiction in the federal government under clause seventeen, in which the legislatures of the states have not passed special acts of cession ceding to the federal government exclusive jurisdiction over the particular areas involved. The Attorney General points out on Page 85 of his brief that forty-two states have general statutes consenting to the purchase of property by the United States.

No special statute of cession over this particular area having been enacted by the legislature of the State of Washington, the question arises as to whether or not the purchase of the land in the area involved comes within any of the provisions of clause seventeen, that is, for the erection of forts, magazines, arsenals, dockyards and other needful buildings. It should be remembered in passing that general statutes of con-

sent are strictly construed. Six Companies Inc., vs. DeVinney, 2 Fed. Supp. 693. The only possible provision under which this acquisition could come would be "other needful buildings." The only case where locks and dams have been defined as needful buildings was in United States vs. Tucker, 122 Fed. 518, where, as we pointed out on Pages 12, 13, and 14 of our former brief, the question arose on a demurrer to an indictment charging the defendant with the crime of murder. Although we have no particular criticism of the holding that lock No. Three on the Green River, under the facts in that case, was a "needful building," still we do not feel that that decision should be followed to the extent of holding that the vast area acquired for the construction of the Grand Coulee Dam is for such a needful building as was contemplated by the framers of the constitution.

May we briefly consider the reasons for the enactment of clause seventeen. It was to avoid conflicts of jurisdiction and to prevent any places on which the security of the entire union might depend to be in any degree dependent on any subdivision of the union. It was to prevent a duplication or conflict of authority which might interfere with the federal government in its protection of the safety and welfare of its people. It was pointed out by the Attorney General in a note on Page 63 of his brief that when the clause was first submitted it contained no provision requiring the consent of the state but that the clause was amended to

require that the purchase be "by the consent of the legislature in which the same shall be." This, the Attorney General pointed out, was in response to Gerry's fear "that the strongholds proposed would be a means of awing the state into undue obedience to the general government." It can be clearly seen that exclusive jurisdiction might be necessary in forts, post offices, government hospitals, etc., where a division or conflict of jurisdiction might interfere with the protection or welfare of the American people. But in the case at bar, if it be found that the building of the Grand Coulee Dam is in aid of navigation, the federal government has a perfect right, under clause two of section eight, (the commerce clause) to condemn land for the purpose of constructing and operating this dam without the consent of the state. As was pointed out by Mr. Justice Bradley in Stockton vs. Baltimore & N. Y. R. Co., 32 Fed. 9, nearly all the powers of government are exercised over territory in which the United States and the several states have concurrent jurisdiction. Under the commerce clause the federal government can acquire this land either by purchase or condemnation, can build this dam, can construct locks and can operate the completed structure without the acquiring of exclusive jurisdiction. The federal government can go into the State of Washington and do these things and the State of Washington can exercise jurisdiction over the people and the businesses within that area without the least hindrance to the people at large.

Having this in mind, can it be said that the State of Washington has given up all jurisdiction over this territory. What were the facts. In 1891 the legislature passed Section 8108, a general consent statute, to comply with the provisions of clause seventeen of the federal constitution. At the time this act was passed, no one had any idea of the construction of a dam on the Columbia River at the head of the Grand Coulee by the federal government. In 1933 the federal government decided to construct this dam and proceeded to acquire an enormous acreage of land for said dam either by purchase or condemnation.

It is a very serious thing for a state to voluntarily submit to the carving out of a portion of its territory and to give up entire jurisdiction over this area. It means the giving up of roads, police protection, courts, schools, collection of taxes, the disenfranchisement of all of its people living within that area. This clearly was not the intention of the framers of the constitution concerning a situation such as this. The court in Fort Leavenworth Railroad Company vs. Lowe, 114 U. S. 525, 530, in referring to clause seventeen said:

> "The essence of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects."

The state clearly has exercised jurisdiction over this area. It has furnished police protection through

the Washington State Patrol and the Sheriffs and Constables in the counties involved. School districts have been formed under the laws of the state. Local police officers, a local justice of the peace and a local deputy coroner are acting under appointment by a county of the state. Trials and convictions have been had before this justice for violating the laws of the state in the area. There is not one iota of evidence in the entire record to indicate that the State of Washington has given up any jurisdiction over this area. Clearly the State of Washington, by its actions, has never considered that the enactment of Section 8108 in 1891 ceded exclusive jurisdiction over this area to the federal government or consented that the federal government should have exclusive jurisdiction by the acquisition of the property under consideration here. In Larson vs. South Dakota, 278 U. S. at Page 436, the court said:

> "But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. . .
>
> * * * * *
>
> A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished."

We have no desire to interfere in any manner with the conduct of the federal government. If the federal government should feel that it would be to the best interests of the people that it should have exclusive jurisdiction over this area, we feel sure that the legislature of the State of Washington would pass a special act of cession, giving to the federal government exclusive jurisdiction. But we respectfully submit that until that is done, the federal government has no right to take exclusive jurisdiction away from the state merely because of the enactment of a general consent statute. The land in question was not purchased with the consent of the state for the erection of forts, magazines, arsenals, dockyards, or other needful buildings. Two separate and distinct powers are given to the federal government under two separate and distinct provisions of the constitution. Under article one, section eight, clause two (the commerce clause), it can acquire land and construct and operate the Grand Coulee Dam. No exclusive jurisdiction is necessary for it to perform these functions. Under article one, section eight, clause seventeen it can, with the consent of the state, if the land is purchased for one of the enumerated purposes, exercise exclusive jurisdiction over this area. There is no need for the exercise of exclusive jurisdiction by the federal government at Grand Coulee. It was never intended by the framers of the constitution that exclusive jurisdiction would be exercised

in a situation such as this. We therefore submit that the judgment should be affirmed.

Respectfully submitted,

E. P. DONNELLY,
Counsel for Appellees

E. W. SCHWELLENBACH,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

Nos. 7, 8.—OCTOBER TERM, 1937.

Silas Mason Company, Inc., Walsh Construction Company, et al., Appellants,
7 *vs.*
Tax Commission of the State of Washington, et al.

David H. Ryan, Appellant,
8 *vs.*
The State of Washington, et al.

} Appeals from the Supreme Court of the State of Washington.

[December 6, 1937.]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

These suits were brought to restrain the enforcement of the Occupation Tax Act of the State of Washington (Laws of 1933, ch. 191, p. 869; Spec. Sess., 1933, ch. 57, p. 157 [1]) as applied to the gross income received by appellants under contracts with the United States for work performed in connection with the building of the Grand Coulee Dam on the Columbia River.[2] The Supreme Court of the State sustained the tax and affirmed judgments dismissing the suits. *Silas Mason Company* v. *State Tax Commission,* 61 Pac. (2d) 1269; *Ryan* v. *State,* 61 Pac. (2d) 1276. The cases come here on appeal.

The questions are (1) whether the tax imposes an unconstitutional burden upon the Federal Government, and (2) whether the areas in which appellants' work is performed are within the exclusive jurisdiction of the United States. On reargument, and at the re-

[1] The Act describes the tax as laid "upon the privilege of engaging in business activities". Section 2-a (1) provides: " . . . there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services . . . an annual tax or excise for the privilege of engaging in such business . . . equal to the gross income of the business multiplied by five-tenths of one per cent; . . . ".

[2] Appellant David H. Ryan, in No. 8, also brought an action to obtain a refund of occupation taxes which he had paid. That action was consolidated for hearing in the state courts with the suit for injunction to restrain further collection.

quest of the Court, the views of the Government upon these questions were presented. With respect to the first question, our ruling upholding the validity of a similar tax of West Virginia as laid upon the gross receipts of a contractor engaged in building locks and dams for the United States is controlling. *James* v. *Dravo Contracting Company,* ————. We pass to the question of territorial jurisdiction.

1. The following facts as to the nature and history of the enterprise, as set forth in appellants' complaints and shown by evidence and stipulations, are uncontroverted: The Columbia River, above its lower reaches, partakes of the character of a mountain stream, its fall being great, its current swift and its course marked at intervals of a few miles by rapids flowing over and through rocky masses of such magnitude as to render navigation difficult and in many instances impossible save by the construction of canals and locks. There are great alternations in its flow, its period of high water depending upon the melting of snow in the mountains where its sources are found. Its principal tributary is the Snake River which has the same characteristics. Through improvements that have been made and are contemplated, the Columbia River is commercially navigable from its mouth to the mouth of the Snake and above that point the Columbia is navigable locally, from pool to pool, to the mouth of the Okanogan River, but all such navigation is difficult and not commercially feasible because of the physical conditions above described. These characteristics, however, "render it an ideal stream for the development of hydroelectric power": For the most part the Columbia River within the United States flows through an arid country, "the land being immensely productive and rich when placed under irrigation but of no value without irrigation". The course of the river for the greater part of its length in the United States lies wholly within the State of Washington. From a short distance below the mouth of the Snake, the Columbia is the boundary between the States of Washington and Oregon.

Following sporadic improvements extending over a number of years, the Corps of Engineers of the War Department finally made an exhaustive survey, and in 1932 the Chief of Engineers of the United States Army recommended a comprehensive plan for the development of the Columbia River, which took into consideration the use of its waters for the purposes of navigation, flood control,

pwer development, and irrigation. The plan contemplated the construction of ten dams across the river at various points in Washington and where the river is the boundary between Washington and Oregon. The uppermost of these dams is at the head of Grand Coulee in Washington about 150 miles below the international boundary and 274 miles above the mouth of the Snake River. The plan was commonly described as the Columbia Basin Project.

In June, 1933, Harold L. Ickes was appointed Administrator of Public Works and later the President, under authority of the National Industrial Recovery Act (secs. 201-203, 48 Stat. 200-205) directed the Administrator to include in the Public Works program the Grand Coulee Dam and Power Plant. Appellants state that the project as finally recommended by the War Department and the Department of the Interior contemplated, among other features, a dam at the Grand Coulee to be 370 feet high above low water (550 feet high, as actually constructed) and 4290 feet long on the crest, and a power plant to develop 2,100,000 horse power, at a total cost of $392,000,000. Appellants add that this is the key dam on the river and will create a lake 150 miles long, reaching the Canadian boundary; that over five million acre feet of storage will become available, the release of which when the flow of the river is at its lowest will double the prime power of the river downstream to the Snake River and add more than 50 per cent to the power of the Columbia below the Snake; that the storage will have an appreciable effect in reducing floods on the whole river and that "there will be 905,500 acres of first class land available for irrigation".

In 1933, the legislature of the State of Washington created the Columbia Basin Commission to promote the Columbia Basin Project. Laws of 1933, ch. 81, p. 376; *Ryan* v. *State, supra,* p. 1277. For that purpose the Commission obtained an allocation of $377,000 of the emergency relief funds of the State. On June 30, 1933, the United States, represented by the Commissioner of the Bureau of Reclamation, under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388) and amendatory and supplementary acts, made a contract with the Columbia Basin Commission by which the United States agreed to undertake topographic surveys and exploratory work and prepare certain designs and estimates for which the Columbia Basin Commission undertook to pay within the limits of its appropriation. *Ryan* v. *State, supra,* p. 1278.

On November 1, 1933, the Secretary of the Interior signed a memorandum addressed to himself as Administrator of Public Works in which the Secretary recommended that the project "be considered a federal project to be constructed, operated and maintained by the Bureau of Reclamation and to be paid for from net revenues derived from the sale of its electric power". Under the same date, the United States, represented by the Secretary of the Interior, in pursuance of the Reclamation Act of 1902 and the National Industrial Recovery Act, made a further agreement with the State of Washington providing for the expenditure by the United States, through the Bureau of Reclamation, of the sum of $63,000,000 for the construction of a dam and power plant at the Grand Coulee site, together with necessary transmission lines. There was further provision that the United States should retain title to the dam and power plant until the cost of the project, including the cost of the first unit dam and power plant, had been fully repaid into the United States Treasury; that the State Commission should act as an advisory board in conference with officers of the United States concerning the various important questions which might arise in connection with the construction and use of the dam, power plant and transmission lines; and that the State should have an option to purchase the perpetual right to the entire power output of the first unit dam and power plant upon prescribed conditions. *Ryan* v. *State, supra,* p. 1278.

On December 12, 1933, the Secretary of the Interior and Administrator of Public Works signed an amended Declaration of Taking in the case of *United States* v. *Continental Land Company et al.,* in the United States District Court for the Eastern District of Washington, in which it was stated that certain lands at the Grand Coulee Dam site to the extent of 840.28 acres "are hereby taken for the use of the United States" in the construction of a dam "for the regulation and control of the flow of the Columbia River, for a storage reservoir from the damsite to the Canadian boundary, for the improvement of navigation, for flood control, for hydro-electric power development at the Grand Coulee damsite, for the increase of power development down-stream, for the reclamation of arid and semi-arid lands, for the domestic use of water, and for the relief of unemployment." Thereupon the United States immediately acquired title and possession of the lands involved. 40 U. S. C.

258a. Shortly after, on January 4, 1934, the First Assistant Secretary of the Interior gave formal notice to the Commissioner of Public Lands of Washington of the intention of the United States to make examinations and surveys and attached to the notice a list of lands owned by the State "over and upon which the United States requires rights of way for canals, ditches, laterals and sites for reservoirs and structures appurtenant thereto; and such additional rights of way and quantities of land as may be required for the operation and maintenance of the completed works for the said proposed Columbia Basin Project". The notice was given pursuant to the state statutes to which we shall presently refer. The lands in this list are described as "Bed and Shore Lands of Washington State" and "Uplands of Washington State", affected by Columbia Basin Project.

In December 1933, the Department of the Interior entered into a contract with David H. Ryan (No. 8) for the excavation of the "over-burden" at the damsite. That work was upon land, above high water mark, already or about to be acquired by the United States. The contractor completed it in the summer of 1934, maintaining his office and living quarters within the territory of the Grand Coulee Project. The contract provided that the appellant should "obtain all required licenses and permits", should furnish "compensation insurance" in compliance with the laws of the State, and should "comply with all applicable provisions of federal, state and municipal safety laws and building and construction codes". *Ryan* v. *State, supra,* p. 1279.

In July, 1934, a contract was made between the United States and Silas Mason Company and others, appellants in No. 7, for the construction of part of the Grand Coulee Dam and Power Plant covered by described items in the schedule of specifications, for the sum of $29,339,301.50.[3] This contract, like that of Ryan, required the contractor to obtain licenses and permits and to furnish compensation insurance in compliance with the workmen's compensation law of the State.

Such a vast undertaking necessarily had in view a large number of employees who with their families would require the appropriate

[3] For administrative purposes and to avoid confusion with business operations of the contractors elsewhere, the contractors organized the appellant Mason-Walsh-Atkinson-Kier Company, and to avoid objections to an assignment of the contract they entered into an agreement with the United States in September, 1934, by which the new company was constituted the agent of the contractors for the prosecution of the work without relinquishment of their obligations.

facilities of community life. Accordingly, the specifications provided for the erection on the tract acquired by the Government of a "contractor's camp", embracing the various buildings incident to the work and homes for the contractor's employees. The contractor was required, regardless of the approval of the contracting officer, to "comply with all the laws and regulations of the State of Washington or any agency or subdivision thereof, which affect the building, maintenance or operation" of the camp. The discharge of sewage into the Columbia River was to conform to the laws and regulations of the Department of Health of the State. The contractor was to make all necessary arrangements with the proper state and county authorities for school facilities and for police protection which within "the area involved in and surrounding the construction work" was to be furnished by the Washington State Patrol in cooperation with the Government. The contractor was also to provide and maintain jail facilities satisfactory to the Washington State Patrol and to cooperate with it and the Government in the maintenance of law and order.

The contractor's camp has developed into a community called "Mason City". On the opposite side of the river lies another camp maintained by the United States for the offices and residences of its engineers. It appears that there are "two regularly formed school districts" in the area in question, one in the "engineers' town" and one in "Mason City", under the laws of the State of Washington; that in "Mason City" the policemen employed by the contractor have been made deputy sheriffs of Okanogan County; that the attorney for the contractor has been appointed a justice of the peace, and one of the doctors in the hospital at the camp has been made a deputy coroner, in that county; that, in the fall of 1933, one who was operating a beer parlor within the part of the area which lies in Grant County without a permit from the county commissioners, was fined in a justice's court as provided in the local ordinance; that the sheriff of Grant County has been called to the damsite to investigate infractions of local law.

In September 1934, the Department of the Interior made a further contract with appellant Ryan for the construction of a railroad connecting with the tracks of the Northern Pacific Railway Company at Odair, Washington, and running to the site of the Grand Coulee Dam. The sole purpose of this railroad was to assist in the construction of the dam and the appurtenant works.

By the Act of August 30, 1935, 49 Stat. 1028, 1039, 1040, the Congress "validated and ratified" all the "contracts and agreements" which had been executed in connection with the Grand Coulee Dam.

2. No question is presented as to the constitutional authority of Congress to provide for this enterprise or to acquire the lands necessary or appropriate for that purpose. There is no contention that the State may interfere with the conduct of the enterprise. The question of exclusive territorial jurisdiction is distinct. That question assumes the absence of any interference with the exercise of the functions of the Federal Government and is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising any legislative authority including its taxing and police power in relation to the property and activities of individuals and corporations within the territory. The acquisition of title by the United States is not sufficient to effect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise. *Surplus Trading Company* v. *Cook,* 281 U. S. 647, 650-652; *James* v. *Dravo Contracting Co., supra.* See, also, *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 527, 539; *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439, 451; *United States* v. *Unzeuta,* 281 U. S. 138, 142.

In this instance, the Supreme Court of Washington has held that the State has not yielded exclusive legislative authority to the Federal Government. *Ryan* v. *State, supra.* That question, however, involving the extent of the jurisdiction of the United States, is necessarily a federal question. *Brewer-Elliott Oil Co.* v. *United States,* 260 U. S. 77, 87; *United States* v. *Utah,* 283 U. S. 63, 75; *Borax Consolidated* v. *Los Angeles,* 296 U. S. 10, 22.

3. The question arises with respect (a) to lands acquired by the United States from the State itself, (b) to lands acquired by the United States from individual owners by purchase or condemnation, (c) to Indian tribal lands.

Lands acquired from the State. These consist of the river bed and shore lands and of certain uplands including "school lands".

While the United States has paramount authority over the river for the purpose of the control and improvement of navigation, the title to the river bed, as well as to the shore lands and school lands, was in the State (*Port of Seattle* v. *Oregon-Washington R. R. Co.,* 255 U. S. 56, 63) and the State had legislative authority over all this

area consistent with federal functions. *United States* v. *Bevans*, 3 Wheat. 336, 386, 387; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9, 18; *Hamburg American S. S. Co.* v. *Grube*, 196 U. S. 407, 415; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 371, 372. The notice to the state authorities by the Department of the Interior with respect to the river bed, shore lands and uplands owned by the State was said to be given "pursuant to the Act of Congress of June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto". 43 U. S. 371 *et seq.* The notice is set forth in the margin.[4] The reference is to the United States Reclamation Act. That Act was not intended to provide for the acquisition of exclusive federal jurisdiction. The Act itself stated the contrary (section 8, 43 U. S. C. 383). It directed the Secretary of the Interior to proceed in conformity with the state laws in carrying out the provisions of the Act and provided that nothing therein contained should be construed as interfering with the laws of the State relating to the control, appropriation, use or distribution of water used in irrigation. The Act has been administered in harmony with this controlling principle that the State should not be ousted of jurisdiction. See *Kansas* v. *Colorado*, 206 U. S. 46, 92, 93; *Nebraska* v.

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[4] "United States Department of the Interior
Office of the Secretary, Washington

Jan - 4 1934

Bureau of Reclamation
Mails and Files, Jan 5 1934
Washington, D. C.
State Commissioner of Public Lands,
Olympia, Washington.

Dear Sir:

Please take notice that pursuant to the Act of Congress of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplementary thereto, the United States intends to make examinations and surveys for the utilization of the waters of Columbia River and its tributaries in the development of the proposed Columbia Basin Project.

The foregoing notice is given pursuant to Section 3378 of Pierce's Code (1929).

Please take further notice that attached hereto, identified as "Exhibit A" and made a part hereof is a list of lands owned by the State of Washington, over and upon which the United States requires rights of way for canals, ditches, laterals and sites for reservoirs and structures appurtenant thereto; and such additional rights of way and quantities of land as may be required for the operation and maintenance of the completed works for the said proposed Columbia Basin Project. Please file this notice, together with the attached list, in your office, as a reservation from sale or other disposition of such lands, so described, by the State of Washington.

The notice last herein given is in pursuance of Section 3380 of Pierce's Code (1929).

Very truly yours,
(Sgd.) T. A. WALTERS,
First Assistant Secretary."

Wyoming, 295 U. S. 40, 42; *California Oregon Power Co.* v. *Beaver Cement Co.*, 295 U. S. 142, 164.

The Department of the Interior expressly stated that the notice was given "pursuant to Section 3378 of Pierce's Code (1929)" with respect to examinations and surveys, and the list of state lands "in pursuance of Section 3380 of Pierce's Code (1929)". These are Sections 7410 and 7412 of Remington's Revised Statutes, which with related provisions were enacted in 1905. Laws of Washington, 1905, p. 180. These provisions are set forth in the margin.[5] They

[5] "Section 7410. *Exemptions pending federal investigation.* Whenever the secretary of the interior of the United States, or any officer of the United States duly authorized, shall notify the commissioner of public lands of this state that pursuant to the provisions of the act of congress approved June 17, 1902, entitled, 'An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands', or any amendment of said act or substitute therefor, the United States intends to make examinations or surveys for the utilization of certain specified waters, the waters so described shall not thereafter be subject to appropriation under any law of this state for a period of one year from and after the date of the receipt of such notice by such commissioner of public lands; but such notice shall not in any wise affect the appropriation of any water theretofore in good faith initiated under any law of this state, but such appropriation may be completed in accordance with the law in the same manner and to the same extent as though such notice had not been given. No adverse claim to any such waters initiated subsequent to the receipt by the commissioner of public lands of such notice shall be recognized, under the laws of this state, except as to such amount of the waters described in such notice or certificate hereinafter provided as may be formally released in writing by a duly authorized officer of the United States. If the said secretary of the interior or other duly authorized officer of the United States shall, before the expiration of said period of one year, certify in writing to the said commissioner of public lands that the project contemplated in such notice appears to be feasible and that the investigation will be made in detail, the waters specified in such notice shall not be subject to appropriation under any law of this state for the further period of three years following the date or receipt of such certificate, and such further time as the commissioner of public lands may grant, upon application of the United States or some one of its authorized officers and notice thereof first published once in each week for four consecutive weeks in a newspaper published in the county where the works for the utilization of such waters are to be constructed, and if such works are to be in or extend into two or more counties, then for the same period in a newspaper in each of such counties: Provided, that in case such certificate shall not be filed with said commissioner of public lands within the period of one year herein limited therefor the waters specified in such notice shall, after the expiration of said period of one year, become unaffected by such notice and subject to appropriation as they would have been had such notice never been given: And provided further, that in case such certificate be filed within said one year and the United States does not authorize the construction of works for the utilization of such waters within said three years after the filing of said certificate, then the waters specified in such notice and certificate shall, after the expiration of said last named period of three years, become unaffected by such notice or certificate and subject to appropriation as they would have been had such notice never been given and such certificate never filed".

"Section 7411. *Appropriation—Title to beds and shores.* Whenever said secretary of the interior or other duly authorized officer of the United States

were manifestly enacted to give authority to the United States to acquire property for the purposes of irrigation under the United States Reclamation Act and with the corresponding limitations. Thus Section 7410 (Section 3378 of Pierce's Code) provides for notice by the Secretary of the Interior to the Commissioner of Public Lands of the State that the United States pursuant to the Reclamation Act intends to make examinations or surveys for the utilization of specified waters. And Section 7412 (Section 3380 of Pierce's Code) contemplates the proceeding under the Reclamation Act as described in Section 7410.

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shall cause to be let a contract for the construction of any irrigation works or any works for the storage of water for use in irrigation, or any portion or section thereof, for which the withdrawal has been effected as provided in section 7410 any authorized officer of the United States, either in the name of the United States or in such name as may be determined by the secretary of the interior, may appropriate, in behalf of the United States, so much of the unappropriated waters of the state as may be required for the project, or projects, for which water has been withdrawn or reserved under the preceding section of this act, including any and all divisions thereof, theretofore constructed, in whole or in part, by the United States or proposed to be thereafter constructed by the United States, such appropriation to be made, maintained and perfected in the same manner and to the same extent as though such appropriation had been made by a private person, corporation or association, except that the date of priority as to all rights under such appropriation in behalf of the United States shall relate back to the date of the first withdrawal or reservation of the waters so appropriated, and in case of filings on water previously withdrawn under said section 7410, no payment of fees will be required. Such appropriation by or on behalf of the United States shall inure to the United States, and its successors in interest, in the same manner and to the same extent as though said appropriation had been made by a private person, corporation or association. The title to the beds and shores of any navigable lake or stream utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for, shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works".

"Section 7412. *Reservation of necessary lands by United States — Procedure*—When the notice provided for in section 7410 shall be given to the commissioner of public lands the proper officers of the United States may file with the said commissioner a list of lands (including in the term 'lands' as here used, the beds and shores of any lake, river, stream, or other waters) owned by the state, over or upon which the United States may require rights of way for canals, ditches, or laterals or sites for reservoirs and structures therefor or appurtenant thereto, or such additional rights of way and quantity of land as may be required for the operation and maintenance of the completed works for the irrigation project contemplated in such notice, and the filing of such list shall constitute a reservation from the sale or other disposal by the state of such lands so described, which reservation shall, upon the completion of such works and upon the United States by its proper officers filing with the commissioner of public lands of the state a description of such lands by metes and bounds or other definite description, ripen into a grant from the state to the United States. The state, in the disposal of lands granted from the United States to the state, shall reserve for the United States rights of way for ditches, canals, laterals, telephone and transmission lines which may be required by the United States for the construction, operation and maintenance of irrigation works".

Section 7411 (Section 3379 of Pierce's Code) refers to the same sort of proceeding. As to appropriation of water, it provides that appropriation "by or on behalf of the United States shall inure to the United States, and its successors in interest, in the same manner and to the same extent as though said appropriation had been made by a private person, corporation or association." As to acquisition of title by the United States, it provides:

"The title to the beds and shores of any navigable lake or stream utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for, shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works".

Neither in the statutes governing the proceeding initiated by the Secretary of the Interior nor in the state statute was there provision for acquisition by the United States of exclusive legislative authority over the lands of the State to which title was thus obtained. This is true with respect to all the lands mentioned in the Secretary's notice embracing the bed of the river, the shore lands and the designated uplands including school lands.

Lands acquired by purchase or condemnation. Appellants contend that exclusive jurisdiction as to these lands vested *ipso facto* in the Federal Government by the operation of Clause 17, Section 8, Article I, of the Federal Constitution, which provides that the Congress shall have power "to exercise exclusive legislation" over "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings". Considering this provision in *James* v. *Dravo Contracting Company, supra,* we construed the phrase "other needful buildings" to embrace locks and dams and whatever structures are found to be necessary in the performance of the functions of the Federal Government. We also concluded that Clause 17 should not be construed as implying a stipulation that the consent of the State to purchases must be without reservations. We were unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation.

The statute of Washington which is relied upon as granting consent and ceding exclusive jurisdiction to the Federal Government

is Section 8108 of Remington's Revised Statutes, the full text of which is quoted in the margin.[6] This statute gives consent to the acquisition of lands by the United States "for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of Congress". The consent is said to be given in accordance with the constitutional provision found in Clause 17 of Section 8 of Article I and with the acts of Congress in such cases made and provided.

The statute in terms refers to such acquisition "from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state". This language is not apt to describe acquisitions from the State itself. And many years ago (1903) the Supreme Court of the State so held with respect to the corresponding provisions of the Acts of 1890, p. 459, and 1891, p. 31, embodied in Section 8108. *State ex rel. Bussell* v. *Callvert*,

[6] "Section 8108. *Consent to acquisition of certain rights by United States, etc.*—The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, and all deeds, conveyances of title papers for the same shall be recorded as in other cases, upon the land records of the county in which the land so acquired may lie; and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States, which may be set apart by the general government for any or either of the purposes before mentioned by an order, patent, or other official document or papers describing such lands; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted".

33 Wash. 380, 388-390. Under that construction, the above quoted provisions of Section 8108 would be inapplicable to the acquisition of title to the river bed, shore lands and uplands owned by the State, apart from our conclusions in the light of the proceedings taken under the United States Reclamation Act and the pertinent state statute.

With respect to lands acquired from private owners, the Supreme Court of the State has held in the instant case that the enterprise of the Federal Government has a reach which takes it outside the purview of Section 8108. The pith of the decision is that while the statute contemplated the building of locks and dams and other structures required in the improvement of the rivers and harbors of the State, it did not contemplate the yielding by the State of all legislative authority in connection with such a project as the Columbia Basin Project embracing "the development of irrigation and of power for industrial purposes". The state court concluded "that the purposes of the project, taken as a whole, do not fall exclusively within any of the enumerated classes mentioned above [in the statute], so as to give the United States exclusive jurisdiction over the lands, but rather in a class where several purposes are so intermingled as to call for the exercise of jurisdiction by both the federal government and the state, according as their respective interests and duties require". *Ryan* v. *State, supra,* p. 1284.

Considering the scope of the federal undertaking, we cannot say that this construction of Section 8108 is inadmissible. Thus irrigation—"the reclamation of arid and semi-arid lands"—is an integral part of the federal plan and the reservoirs for the storage of water were to be provided with that end in view. That was set forth as one of the main objectives, as well as the development of power, in the Declaration of Taking filed in the federal court in the condemnation proceedings, and whatever may be said of power development so far as it is incidental to the improvement of navigation, the reclamation of arid or semi-arid lands has always been regarded as a project which carried with it an appropriate recognition of a continued state jurisdiction. *Kansas* v. *Colorado, supra; Nebraska* v. *Wyoming, supra.* We cannot say that the state statute, enacted in 1891, must be taken as conclusively showing an intent to yield exclusive jurisdiction in such a case. Assuming that because of the presence of the federal question we are at liberty to construe the statute for ourselves, we should, in harmony with our principles of

decision in such cases, give great weight to the views of the state court as to the intent and limitations of the state statute in granting consent and cession. See *Freeport Water Company* v. *Freeport,* 180 U. S. 587, 595, 596; *Milwaukee Electric R. & L. Co.* v. *Railroad Commission,* 238 U. S. 174, 184; *Phelps* v. *Board of Education,* 300 U. S. 319, 322; *Dodge* v. *Board of Education,* decided November 8, 1937. We should accept that construction unless we are satisfied that it does violence to federal right based upon the statute, defeating the reasonable anticipation and purpose of securing through the operation of the statute an essential and exclusive legislative authority for the Federal Government.

Not only do we find no violence done to federal right or frustration of federal intent by the State's construction of its statute, but the evidence is clear that the Federal Government contemplated the continued existence of state jurisdiction consistent with federal functions and invited the cooperation of the State in providing an appropriate exercise of local authority over the territory.

Even if it were assumed that the state statute should be construed to apply to the federal acquisitions here involved, we should still be met by the contention of the Government that it was not compelled to accept, and has not accepted, a transfer of exclusive jurisdiction. As such a transfer rests upon a grant by the State, through consent or cession, it follows, in accordance with familiar principles applicable to grants, that the grant may be accepted or declined. Acceptance may be presumed in the absence of evidence of a contrary intent, but we know of no constitutional principle which compels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interests. The mere fact that the Government needs title to property within the boundaries of a State, which may be acquired irrespective of the consent of the State (*Kohl* v. *United States,* 91 U. S. 367, 371, 372), does not necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction. We have frequently said that our system of government is a practical adjustment by which the national authority may be maintained in its full scope without unnecessary loss of local efficiency. In acquiring property, the federal function in view may be performed without disturbing the local administration in matters which may still appropriately pertain to state authority. In our opinion in *James* v. *Dravo Contracting Company, supra,* we observed that the possible importance of reserving to the State jurisdiction for local purposes which in-

volve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. And we added that there appeared to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases.

The federal intent in this instance is clearly shown. It is shown not merely by the action of administrative officials, but by the deliberate and ratifying action of Congress, which gives the force of law to the prior official action even if unauthorized when taken. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 301, 302. As Congress validated and ratified "all contracts" which have been executed in connection with the Grand Coulee Dam project, we are at liberty to refer to the terms of these contracts as manifesting the intention of Congress no less than that of the officers who executed them. These contracts with appellants were made in full appreciation of the inevitable creation, through the carrying out of this project, of a large local community within the area acquired by the United States, with residents whose needs could be suitably served by the administration of the laws of the State without interfering in any way with the execution of the federal plan. School facilities were to be, and have been, provided by arrangements with the local authorities. Police protection was to be, and has been, assured by cooperation with the State Patrol. Cognizance of crimes committed within the area has been taken by local prosecutors and judicial officers. It is futile to say that these local authorities became federal authorities *pro hac vice,* for the contracts which have been ratified by Congress manifestly contemplated action by the local officers as representatives of the State and as acting in the exercise of state jurisdiction.

In particular, appellants' contracts assumed that state jurisdiction would extend to activities of the contractors. They were to obtain all required licenses and permits. Compensation insurance under the laws of the State was to be provided for their employees. State building regulations were to be obeyed. The rules of the local Department of Health were to be observed in the discharge of sewage into the river. We are at a loss to understand how the continued jurisdiction of the State without conflicting with federal operations could have been more fully recognized, or the assumption of exclusive legislative authority by the United States more

effectively disclaimed, than by the action of Congress in ratifying the provisions of these contracts.

Appellants' argument comes to this—that we must not only override the construction of the state statute by the state court but that we must construe the statute as compelling the Federal Government to assume an exclusive legislative authority which it did not need, which it has not accepted or exercised, and against the burden of which it has sought to protect itself by securing state cooperation in accordance with the express authorization of Congress. We find no warrant for such action.

Indian tribal lands. What has been said also disposes of the contention in relation to this part of the area. Appellants say that title was originally in the United States for the benefit of Indians on the Colville Reservation. Executive Order of July 2, 1872. While at a later date the lands were opened for entry (Act of March 27, 1906, 34 Stat. 80; Proclamation of the President, May 3, 1916, 39 Stat. 1778) it appears that they were withdrawn before any entry was made. Appellants concede that title to these lands has always been in the United States and hence could not have been acquired by purchase or condemnation. But with respect to such lands exclusive legislative authority would be obtained by the United States only through cession by the State. *Surplus Trading Co.* v. *Cook, supra,* p. 651. If they may de deemed to be within the reference in Section 8108 to "public land" which "may be set apart by the general government" for the purposes "before mentioned", we are brought back to the questions already discussed and we need not consider the question whether these lands had in fact been set apart in the prescribed manner.

Our conclusion is that the State had territorial jurisdiction to impose the tax upon appellants' receipts and that the tax does not lay an unconstitutional burden upon the Federal Government.

The respective judgments are

Affirmed.

Mr. Justice McReynolds, Mr. Justice Sutherland, Mr. Justice Butler and Mr. Justice Roberts dissent for the reasons stated in the dissenting opinion in *No. 3, James* v. *Dravo Contracting Company.*